85-707

Supreme Court, U.S.
FILED
OCT 10 1985
JOSEPH F. SPANIOL, JR
CLERK

No.

IN THE
# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CITY OF PHILADELPHIA,
*Petitioner,*

*v.*

BOROUGH OF GLASSBORO, et al.,
*Respondents.*

# PETITION FOR WRIT OF CERTIORARI

Petition for Writ of Certiorari
to the Supreme Court of New Jersey

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## QUESTION PRESENTED FOR REVIEW

Whether or not a New Jersey court order that enjoins the City of Philadelphia, as well as all other out-of-state solid waste generators, from disposing of solid waste in a privately-owned New Jersey landfill on the grounds that the landfill is a scarce resource needed by local New Jersey communities, which communities would find alternative disposal sites more expensive, violates the Commerce Clause of the United States Constitution.

## LIST OF ALL PARTIES TO PROCEEDINGS

Petitioner

City of Philadelphia*

Respondents

Borough of Glassboro
County of Salem
County of Camden**
Gloucester County Board of Chosen Freeholders**

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*In the case below, the following parties were included, along with the City of Philadelphia, as defendants:

Gloucester County Board of Chosen Freeholders
County of Camden
The New Jersey Department of Environmental Protection
Robert E. Hughey, Commissioner of the New Jersey Department of Environmental Protection
Kinsley Landfill, Inc.

**As the interests of the Gloucester County Board of Chosen Freeholders and the County of Camden, originally named as defendants in the Glassboro complaint,

Township of Deptford**
Board of Health of the Borough of Glassbor
Borough of Clayton
Borough of National Park
Borough of Pitman
Borough of Swedesboro
Borough of Wenonah
Borough of Westville
Camden County Municipal Utility Authority
City of Woodbury
Township of Franklin
Township of Monroe
Township Pennsauken
Township of West Deptford
Township of Woolwich
Ray MacKay, Jr., Waste Removal Inc.
Landis Sewerage Authority
Rockaway Valley Regional Sewage Authority
Clementon Sewerage Authority

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and the Township of Deptford, a defendant-intervenor, are aligned and co-extensive with those of the plaintiffs and plaintiff-intervenors below, we have listed them as respondents to this petition.

Deptford Township, Edward Lawrenson, Inc., Quick-Way, Inc., Hancock Waste Removal, Ace Service Corporation, W. Lafferty, Inc. and A & B Dump Truck Services intervened below as defendants.

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CITY OF PHILADELPHIA,
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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

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## OPINIONS BELOW

The opinion of the Supreme Court of New Jersey in No. A-179, September Term, 1984 was filed on July 10, 1985 and is reported at 100 N.J. 134, 495 A.2d 49 (1985). The opinion of the Superior Court of New Jersey, Appellate Division, in No. A-1440-84 T5 was filed on February 15, 1985 and is reported at 199 N.J. Super. 91, 488 A.2d 562 (1985). The opinion of the Superior Court of New

Jersey, Law Division, in No. L-070476-84 P.W. was filed on November 13, 1984 and is not officially reported. Copies of all of the opinions appear in the Appendix hereto.

## STATEMENT OF JURISDICTION

An order for preliminary injunction was entered in the New Jersey Superior Court, Law Division, against petitioner City of Philadelphia on November 13, 1984. This order was affirmed by the New Jersey Superior Court, Appellate Division, by opinion dated February 15, 1985. The judgment of the Appellate Division was then affirmed by the New Jersey Supreme Court by opinion dated July 10, 1985.

The jurisdiction of the United States Supreme Court to review the decision of the New Jersey Supreme Court is invoked pursuant to and in accordance with 28 U.S.C. §1257(3) and 28 U.S.C. §2101(c).

## TEXT OF CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Article I, Section 8, clause 3:

The Congress shall have the Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

## STATEMENT OF THE CASE

On July 10, 1985, the Supreme Court of New Jersey affirmed the exclusion of solid waste generated in Pennsylvania, solely on the basis of its origin, so that landfill space in New Jersey could be reserved for the exclusive use of New Jersey communities. In so affirming, the New Jersey court flaunts the dictates of Philadelphia v. New Jersey, 437 U.S 617 (1978).

Since the 1950's, the City of Philadelphia has sent its solid waste to the Kinsley Landfill, a solid waste disposal facility located in Gloucester County, New Jersey. The landfill is privately owned but is operated as a public utility under New Jersey law. For the fiscal year ending June 30, 1984, the City's utilization of Kinsley represented 30 percent of

the total disposal at Kinsley, but nearly 40 percent of all municipally-collected waste generated within the City. Another 26 percent of the total disposal at Kinsley was attributable to solid waste generated within the City but disposed at Kinsley by private waste haulers pursuant to contracts with private businesses and industries in Philadelphia. Virtually all of the solid waste generated within New Jersey and deposited at Kinsley emanated from three New Jersey counties: Gloucester, Salem and Camden. In the third quarter of 1984, New Jersey municipalities outside of this tri-county area contributed only approximately six percent of all waste disposed of at Kinsley, with the bulk of that six percent consisting of sewage sludge.

After receiving notice on October 11, 1984 that Kinsley was reaching its per-

mitted capacity and would cease accepting waste on October 28, 1984, respondent Borough of Glassboro instituted suit on October 17, 1984 in the Superior Court of New Jersey, Law Division, seeking (a) an order enjoining the closing of Kinsley and directing an emergency expansion of the landfill and (b) an injunction restraining the City of Philadelphia and Camden County, New Jersey from disposing of their solid waste at Kinsley (App. at 131A). In its answer to the complaint, the City of Philadelphia raised the defense that the relief sought by the New Jersey municipality against it was violative of the Commerce Clause of the United States Constitution (App. at 186A). Other New Jersey municipalities and a private New Jersey waste hauler subsequently intervened in this action as plaintiffs, while the

private waste haulers who disposed of waste generated in Pennsylvania at Kinsley intervened as defendants.

After conducting evidentiary hearings, the New Jersey Superior Court temporarily enjoined the closing of Kinsley and ordered the owners of the landfill to design a 16-foot vertical expansion of the disposal facility (App. at 126A). The court also ordered the New Jersey Department of Environmental Protection (DEP) to review the design to ascertain its effect on the local environment and to formulate a plan for the orderly closure of the landfill. The court reserved its decision on excluding Philadelphia and Camden County pending further hearing.

In its report to the court, DEP found the proposed 16-foot vertical lift acceptable (subject to certain corrections)

and submitted its plan for closure (App. at 197A). DEP concluded that the proposed expansion would last approximately three and one-half months if all of the current Kinsley users continued at their present rate of disposal. However, DEP stressed that since waste generated within Philadelphia and other Pennsylvania communities (none of which were parties in this proceeding) accounted for the majority of the waste disposed of at Kinsley, the capacity of the landfill would not be reached for approximately one year if Kinsley were ordered to cease accepting out-of-state waste. DEP therefore recommended that access to Kinsley for waste disposal should be limited to municipalities in the tri-county area of Gloucester, Salem and Camden, and that access be denied to the City of Philadelphia and all other out-of-state users.

On November 13, 1984, the New Jersey court adopted the report of DEP in its entirety and issued a preliminary injunction restraining the closing of Kinsley and ordering the requested 16-foot vertical expansion of the facility (App. at 118A). Furthermore, the court, while directing Gloucester, Salem and Camden counties to establish operational landfills within their borders by November, 1985 and to maximize their recycling efforts, permitted the New Jersey municipalities in those three New Jersey counties to continue to use Kinsley to dispose of their solid waste. However, the trial court enjoined, effective November 27, 1984, the disposal at the landfill of "all solid waste generated within the City of Philadelphia and other Pennsylvania communities, and other out of district solid waste not sub-

ject to interdistrict agreements" (App. at 120A). (Camden County was allowed access to Kinsley because it had executed an interdistrict waste-flow agreement with Gloucester County shortly before the November 13, 1984 preliminary injunction. Salem County had executed its waste-flow agreement with Gloucester County only five months before that.) The court also restrained the disposal of all sewage sludge at Kinsley as of March 15, 1985.

In issuing its order, the New Jersey trial court stated from the bench that in Philadelphia v. New Jersey, 437 U.S. 617 (1978), this Court distinguished

> the test to be applied when a statutory authority was discriminatory on its face and the test applicable when a statutory authority regulates even-handedly to effectuate a legitimate public interest imposing an incidental burden on interstate commerce. The latter test is, and I quote, "The statute will be upheld unless the burden imposed on such commerce is clearly excessive in

relationship to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." Philadelphia v. New Jersey, 437 U.S. at 624, citing Pike v. Bruce Church, Inc., 397 U.S. 137. * * * In the case at bar, the requirement of inter-district waste flow agreements to insure the integrity of the county or district plan as part of a coordinated statewide management of waste facilities was a requirement imposed on in-state districts as well as out-of-state districts. The burden on interstate commerce was minimal in light of the same burden being placed on in-state districts.

* * * *

I balanced the equities in that I visualize the horrendous specter of tomorrow trash piling up in the vicinty of this courthouse. I have considered sky-rocketing municipal costs, which, of course, goes -- and I have said this many times and I will say it again, because we are talking frankly today, because this is a problem that affects all of us. The poor taxpayer, he takes it on the chin when he gets the tax bill,

sky-rocketing municipal costs in placing this trash elsewhere. I've considered the poor citizens of Deptford Township, who have lived with this ordeal as the testimony and the record reveals to this court. An lastly -- before that, I've considered Philadelphia's plight and have not treated that lightly. But I felt for the reasons that I stated that I must do what I had to do today in regard to this horrendous problem. And lastly, I've considered the vast specter, the vast plan of trash disposal not only in Gloucester County. I've considered my decision on how it affects Salem County, Camden County, all the municipalities and most important all of the citizens of the State of New Jersey. I have, in effect, issued these orders bearing in mind the balancing of these equities and I find and determine for the reasons that I have given on the record today that the orderly closure of Kinsley can be best accomplished as I have outlined it and as has been recommended by the DEP, that all the citizens of the State of New Jersey, Gloucester, Camden and Salem counties and, of course, Deptford Township will benefit by this decision and I have employed what I feel are equitable and just principles in an effort to avoid doomsday trash disposal, which is upon us today.

Stenographic Transcript of Decision of the Superior Court of New Jersey, Law Division,

Gloucester County (November 13, 1984) (App. at 95A-97A & 109A-111A).

On November 16, 1984, the New Jersey court denied the City of Philadelphia's motion for an order, inter alia, allowing the City, subject to the same conditions as the court imposed on the New Jersey municipalities, to continue to dispose of its solid waste at Kinsley, at a voluntarily reduced level of 40 percent under its current disposal level, for a period of time coextensive with the New Jersey municipalities. On November 21, 1984, the trial court similarly denied the City's motion that a second vertical expansion to Kinsley Landfill be designed and implemented, stating that it was "not relevant to the City of Philadelphia." Stenographic Transcript of Decision of Superior Court of New Jersey (November 21, 1984) at 70-71.

Furthermore, the court rejected the City's request that it consider alternatives which the New Jersey municipalities could have adopted to permit them to accommodate such loss of access to Kinsley as the court had found that the City of Philadelphia supposedly could accommodate, even though there was unrebutted testimony before the court that the City was then currently unable to accommodate a total exclusion from Kinsley. Although DEP concluded in its report to the court that "at present there are in fact no alternative sites in the State of New Jersey to which it would be feasible to redirect the waste flows presently disposed of at the Kinsley Landfill" (App. at 200A), the record nonetheless revealed (1) that the court had found that in August, 1984, Gloucester County had negotiated for the

use of the Colebrookdale Landfill located in Bucks County, Pennsylvania, approximately 75 miles from Gloucester County, as an alternative waste disposal site to Kinsley (App. at 218A), and (2) that Camden County admitted in its answer to the complaint that it had sited two resource recovery facilities and was currently siting a third to meet the needs of its constituent municipalities and, potentially, those of Gloucester County as well.

On November 29, 1984, the New Jersey court issued an order "clarifying" its November 13, 1984 order, declaring that various New Jersey parties (including some outside the tri-county area) could continue to dispose of their sewage sludge at Kinsley until further order of the court, without regard to whether they had executed interdistrict waste-flow agreements with

Gloucester County covering that form of solid waste (App. at 123A). Since most of the solid waste disposed of at Kinsley by New Jersey communities outside of the tri-county area consisted of sewage sludge, the reinstatement of sewage sludge disposal at Kinsley was tantamount to reserving Kinsley solely for the use of New Jersey waste generators, both within and beyond the tri-county area, to the exclusion of all out-of-state waste generators.

The City of Philadelphia appealed the order of the New Jersey Superior Court, Law Division, to the New Jersey Superior Court, Appellate Division. In the appellate court, the City made three constitutional arguments:

1. The lower court's order totally excluding solid waste generated within the City of Philadelphia and all other out-of-state communities from the Kinsley Landfill, while permitting the disposal of waste generated in New Jersey to continue unabated,

constitues blatant economic protectionism and is per se invalid under the Commerce Clause of the United States Constitution;

2. Even if this court finds that the exclusion of the City of Philadelphia and all other out-of-state generators from access to the Kinsley Landfill is not a per se violation of the Commerce Clause, such an exclusion as applied to the facts of this case constitutes a violation of the Commerce Clause; and

3. Even if this court finds that the exclusion of out-of-state generators from access to the Kinsley Landfill is not a per se violation of the Commerce Clause or a violation of the Commerce Clause as applied, the lower court's order barring Philadelphia from using the private landfill violates the mandated balancing test under the Commerce Clause where the outright exclusion poses a substantial burden on interstate commerce and there are less restrictive alternatives available which would have promoted local interests without posing as onerous a burden on interstate commerce.

In an opinion filed on Feburary 15, 1985, the New Jersey Superior Court, Appellate

Division, affirmed the order of the lower court, holding that

> the lost access by Philadelphia and others to the Kinsley site for one year was not a "clearly excessive" concern for local interests in comparison to the "substantial state interest * * * in easing solid waste disposal problems." Minnesota v. Clover Leaf Creamery Co., 49 U.S. 456, 473, 101 S.Ct. 715, 729, 66 L.Ed.2d 659 (1981). Even in Philadelphia v. New Jersey, 437 U.S. at 624, * * * the Supreme Court observed its understanding "that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people." Moreover, but for the judge's order crafted to confront this health emergency, Kinsley would now be closed, because it would have reached its design limits; Philadelphia would have no access, nor would anyone else. We would have left only a public-health crisis in New Jersey. We do not think that the Constitution compels such fatalism.
>
> * * * *
>
> We deem this minimal local burden imposed on interstate commerce for bona fide public safety concerns a constitutionally acceptable imposition. As the cases state, at a certain point in matters involving

> public safety, Commerce Clause considerations must yield to police power. * * * Our review of this matter persuades us that Judge DeSimone's order has respected that delicate balance [between the sanctity of the federal system and local concerns] in this most difficult situation. * * * We must stress that the order of Judge DeSimone in effect forecloses use of the landfill by both in-state and out-of-state users beyond the tri-county area.

488 A.2d 562, 568 & 570 (1985) (App. at 68A-69A & 78A-79A).

Thereafter, the City of Philadelphia appealed to the Supreme Court of New Jersey. In that court, the City made four constitutional arguments:

1. The Appellate Division erred by failing to find that the trial court's order totally excluding from Kinsley solid waste generated within Philadelphia and all other out-of-state communities, while permitting the unabated disposal of New Jersey waste, constitutes blatant economic protectionism and a per se violation of the Commerce Clause;

2. The Appellate Division erred by holding that exigent circumstances constitutionally justify the

embargo imposed on waste generated outside of the State of New Jersey;

3. The Appellate Division erred in holding that the trial court's order was immune from Commerce Clause scrutiny because some New Jersey generators as well as out-of-state generators of solid waste are foreclosed from access to Kinsley; and

4. Even if this court finds that the exclusion of all out-of-state generators from access to the Kinsley Landfill is not a per se violation of the Commerce Clause, the Appellate Division erred by failing to find that the trial court's embargo violated the mandated balancing test under the Commerce Clause, since it is a direct regulation of interstate commerce, and there are less restrictive alternatives available which would have adequately protected local interests without imposing as onerous a burden on interstate commerce.

In an opinion filed on July 10, 1985, the New Jersey Supreme Court affirmed the decision of the New Jersey Superior Court, Appellate Division, stating:

> As an equitable remedy, the [trial court's] decree merely preserves space at Kinsley for certain munic-

> ipalities that, as a practical matter, do not have access to other landfills, while remitting other municipalities including Philadelphia, to alternative sites. Additional garbage from any source, either within or outside New Jersey, will displace space at Kinsley needed to avert a health crisis in the three counties. * * * We conclude that the injunction is not discriminatory in purpose or effect. It is plainly not a mere protectionist measure and, therefore, does not constitute a per se violation of the Commerce Clause. Philadelphia v. New Jersey, [437 U.S. 617, 623, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475, 481 (1978)].

495 A.2d 49, 56 (1985) (App. at 28A-29A).

However, the New Jersey Supreme Court further stated:

> We are aware also that the loss of access to Kinsley will impose added costs on Philadelphia. Were it not for the injunction, however, the landfill would be closed not only to former customers outside the tri-county area, such as Philadelphia, but also to those within the three counties. So considered, the effect of the injunction on interstate commerce is incidental. Philadelphia v. New Jersey, supra, 437 U.S. at 624, 98 S.Ct. at 2535, 57 L.Ed.2d at 482; Pike v. Bruce Church, Inc.,

supra, 397 U.S at 142, 90 S.Ct. at 847, 25 L.Ed.2d at 178.

Even if the effect could be characterized as more than incidental, the burden falling on Philadelphia would not be "clearly excessive." Pike v. Bruce Church, Inc., supra, 397 U.S. at 142, 90 S.Ct. at 847, 25 L.Ed.2d at 178. Philadelphia's lost access to an exhausted landfill must be contrasted with the disastrous results that its continued use would visit on the tri-county municipalities. With respect to the economic impact of the closure, the Appellate Division observed that Philadelphia, a city of approximately 1.7 million people with a solid waste disposal budget of approximately $4,000,000, would suffer much less than the 59 municipalities in the tri-county area. 199 N.J. Super. at 100, 488 A.2d at 567.[1] The

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1 The Appellate Division of the New Jersey Superior Court actually found that the closing of Kinsley would increase the City of Philadelphia's Streets Department budget by 5% of $91 million dollars or $4 million in the first year, and not that the Streets Department's existing budget was $4 million. Glassboro v. Gloucester County Board of Chosen Freeholders, 199 N.J. Super. 91, 100, 488 A.2d 369, 567 (1985).

> estimated increase in Philadelphia's budget for solid waste disposal is 5% for the first year following Kinsley's closure and 2% thereafter. Id. By contrast, the solid waste disposal budget of Glassboro, a municipality of some 14,500 people, "could escalate from $100,000 to $1,000,000 per year * * *," and the cost to Camden County, with a population of approximately 500,000 people, could increase from $3,000,000 to $12,000,000 annually. Id.
>
> The closure of Kinsley, however, involves more than cost considerations. It would force the tri-county municipalities to embark on a crash garbage disposal program, one that would include, for example, siting and establishing transfer stations to store garbage temporarily, pending delivery to permanent site. Such a program, as formidable and costly as it would be, would become obsolete in one year, when the new dump sites become operative. * * * Thus, practical considerations demonstrate that the task confronting the tri-county municipalities would be not merely difficult, but virtually impossible to perform. Such considerations confirm the burden on Philadelphia is not excessive.

495 A.2d at 58-59 (footnote added) (App. at 40A-43A).

Finally, the New Jersey Supreme Court determined that the threat to local health, as found by the trial court, could not be averted by a less restrictive injunction:

> Based on the record before us, a plan that accorded to Philadelphia access, even if proportionately reduced, would foreshorten the life of the landfill. Such a plan would not merely be a less effective means of obtaining time for the development of alternative sites; it would be ineffective. See Minnesota v. Clover Leaf Creamery Co., supra, 449 U.S. at 464, 473-74, 101 S.Ct. at 724, 728-29, 66 L.Ed.2d at 669, 675. So viewed, Philadelphia's demand that the tri-county municipalities incur substantial costs for a short-term solution is not so much a request for a less discriminatory alternative as it is an attempt to place an excessive burden on those municipalities. The ideal is even-handedness. Sporhase v. Nebraska, supra, 458 U.S. at 956, 102 S.Ct. at 3464, 73 L.Ed.2d at 1265. That the injunction operates evenhandedly is apparent from the burden it places on the three counties to develop permanent alternatives.

495 A.2d at 59 (App. at 45A-46A).

## REASONS FOR GRANTING THE WRIT

**I. The exclusion of all out-of-state solid waste from the Kinsley Landfill by the New Jersey courts is an act of economic protectionism that constitutes a per se violation of the Commerce Clause of the United States Constitution.**

The preliminary injunction sub judice is embued with the two evils found to be abhorent to the Commerce Clause: economic isolationism and local preference concerning access to resources. As this Court has stated:

> The few simple words of the Commerce Clause -- "The Congress shall have Power ... To regulate Commerce ... among the several States..." -- reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

Hughes v. Oklahoma, 441 U.S. 332, 325

(1979). The Commerce Clause is premised on the Nation being a single, indivisible unit:

> This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in Baldwin v. G.A.F. Seelig, Inc. 294 U.S. 511, 527, 79 L ed 1032, 1040, 55 S Ct 497, 101 ALR 55, "what is ultimate is the principle that one state in its dealing with another may not place itself in a position of economic isolation." In so speaking it but followed the principle that the state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition.

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537-538 (1949); accord, City of Philadelphia v. State of New Jersey, 437 U.S. 617 (1978).

The November 13, 1984 preliminary injunction and its subsequent clarifica-

tion represent the state of New Jersey's decision to isolate New Jersey from a concern that is currently plaguing the national economy: the rising cost of disposing of solid waste. In this regard, the order of the New Jersey trial court attempts to preserve state landfill resources for local New Jersey communities and to minimize for as long as possible the financial expenditures which these New Jersey communities must make to deal with this national problem, by imposing on all of the out-of-state waste generators who had formerly used Kinsley Landfill the full costs of conserving those New Jersey landfill resources. The situation effectuated by this injunction is the same as that which the Court faced in Philadelphia v. New Jersey, 437 U.S. 617 (1978), when New Jersey attempted to legislate the exclusion

of out-of-state solid waste from its landfills. In that case, this Court stated:

> [W]here simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected. . . . The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders.

Philadelphia v. New Jersey, supra, 437 U.S. at 624 (citations omitted).

Economic protectionism may be established by showing that the state action complained of purposefully discriminates against interstate commerce, see Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977); or it may be established by showing that the state action has a discriminatory effect. See Philadelphia v. New Jersey, supra. Accord, Bacchus Imports, Ltd. v. Dias, ___ U.S. ___ 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984). In

the instant case, there can be no question that the effect of the judicially created order is to discriminate against all interstate commerce in the disposal of solid waste at the Kinsley Landfill, while permitting virtually every New Jersey community which had formerly utilized the landfill to continue to do so. Although the original order of the trial court did state that only the three counties in southern New Jersey would be permitted to continue to use Kinsley, the New Jersey Supreme Court recognized that "[v]irtually all the solid waste generated within New Jersey that is deposited at the landfill emanates from Gloucester, Camden and Salem Counties [the very same three counties]." Borough of Glassboro v. Gloucester County Board of Chosen Freeholders, 100 N.J. 134, 495 A.2d 49, 51 (1985) (emphasis added).

Furthermore, on November 29, 1984, the trial court modified its November 13 order to permit sewage sludge from all New Jersey communities, including those located in northern New Jersey to be disposed of in the Kinsley Landfill. This modification accounts for almost all of the New Jersey generated waste that was originally excluded. Thus, the practical effect of the trial court's order was not to restrain both intrastate and interstate commerce as the New Jersey courts have maintained, but rather to ban all interstate commerce from Kinsley, while reserving to the residents of the state of New Jersey the right to dispose of their wastes in the landfill as usual.

The New Jersey courts' characterization of the preliminary injunction as a ban on all commerce other than that of the three

specified New Jersey counties is not controlling on this Court. In considering a challenge to state action under the Commerce Clause, it is the practical impact of the state action that is dispositive:

> [W]hen considering the purpose of a challenged statute [or act], this Court is not bound by "[t]he name, description or characterization given it by the legislature or the courts of the State," but will determine for itself the practical impact of the law.

Hughes v. Oklahoma, supra, 441 U.S. at 336, citing Lacoste v. Lousiana Department of Conservation, 263 U.S. 545, 550 (1924).

Not only does the preliminary injunction in question have the effect of discriminating against interstate commerce, but a close scrutiny of the facts surrounding the issuance of said injunction also highlights the discriminatory purpose of the this extraordinary relief and its inherent economic protectionism and parochialism.

In determining that no alternative waste disposal sites to Kinsley Landfill existed for Gloucester, Salem and Camden counties, the trial court adopted the report prepared by the New Jersey Department of Environmental Protection ("DEP") which had only considered "feasible" solid waste disposal facilities located in New Jersey:

> DEP has examined the alternative waste disposal sites in the State of New Jersey. As set forth in Exhibit "A" annexed hereto, DEP concludes that at present no alternative sites in the State of New Jersey to which it would be feasible to redirect the waste flows presently disposed of at the Kinsley Landfill. (App. at 200A).

DEP had not addressed possible alternative sites in Pennsylvania or elsewhere. In fact, an alternative landfill site in Pennsylvania was discarded by the trial court on the basis of the additional expense which local communities would be

forced to bear. The trial court had found that at the time these proceedings were instituted, Gloucester County was prepared to enter an agreement for the disposal of waste at the Colebrookedale Landfill, located in Bucks County, Pennsylvania:

> There is testimony before this court, and I so find, that the [Gloucester] county is currently negotiating for an alternate site, a place called Colinville-Brookdale [sic] in Pennsylvania and I so find that it was approximately 75 miles from Gloucester County. I further find that the verified allegations of the plaintiff municipalities state that their existing budgets, equipment and manpower at this time are not capable of effectively disposing wastes to these alternate sites.

Stenographic Transcript of Decision of Superior Court of New Jersey, Law Division, Gloucester County (October 26, 1984) at 11-12.

Indeed, Gloucester County's negotiations with Colebrookedale were one of

the reasons underlying the institution of the original proceedings. The principle objection of respondent-plaintiff Borough of Glassboro to the Colebrookedale Landfill as an alternative to Kinsley, as evidenced in the complaint, is the additional monies the New Jersey municipality would have to expend for dumping fees, fuel, additional equipment, etc., in disposing of its waste there. See Complaint of Borough of Glassboro, Fourth Count, paras. 9-15 (App. at 149A-154A). Moreover, the opinions of the New Jersey courts are replete with references to the nonavailability of alternatives to Kinsley Landfill due to the increased financial burdens which would be placed upon local New Jersey communities. For example, the New Jersey Superior Court, Appellate Division, stated:

The record clearly shows that Philadelphia had the equipment and logistical capacity to route its solid waste elsewhere than Kinsley but that the 59 much smaller governmental entities in the New Jersey tricounty area had no feasible alternative to Kinsley because they lacked equipment and other resources to meet the imminent sanitary threat. The record demonstrates that the economic impact of the emergency order issued by Judge DeSimone was only modestly adverse to Philadelphia's Streets' Department budgeted item for this service, about 5% increase which would decrease to 2% after the first year. (Four million of a $91 million annual Streets' Department budget for the first year). Philadelphia's population is about 1.7 million. The economic effect on the 59 local municipalities dependent on Kinsley would have been enormous, assuming indeed there was any possible alternative to the order. Glassboro's budget for solid waste disposal could escalate from $100,000 to $1,000,000 per year for a town of 14,500. Some towns, such as Clayton, Elmer and Woodstown had no alternative to their present private hauler service if Kinsley were closed without access to an alternate local source. The private haulers would simply close down. There was credible evidence before the judge that Camden County's cost could rise from $8 million

> annually to greater than $12 million annually. Camden County has a population of about 500,000. We conclude that Judge DeSimone, in reality, had no choice in the matter but to act as he did to insure public safety. If our conclusion is soundly based, the constitutional arguments raised by appellants fail of necessity.

Glassboro v. Gloucester County Board of Chosen Freeholders, 199 N.J. Super. 91, 488 A.2d 562, 567 (1985), aff'd, 100 N.J. 134, 495 A.2d 49, 58 (1985) (App. at 65A-67A).

This state-imposed burden on all of the interstate commerce which flowed into Kinsley Landfill "cannot be squared with the Commerce Clause when ...[it] serve[s] only to advance 'simple economic protectionism.'" New England Power Co. v. New Hampshire, 455 U.S. 331, 339 (1982). In the New England Power case, this Court, in an unanimous opinion, held a New Hampshire Public Utilities Commission order

which restricted to New Hamsphire the flow of hydroelectric power, privately owned and produced by a public utility company, to be a per se violation of the Commerce Clause, where the premise of such restriction was that New Hampshire customers could save approximately 25 million dollars a year.

There exist no relevant distinction between the purpose and the effect of the New Jersey courts in fashioning and sustaining the validity of the preliminary injunction in question and that of the New Hampshire Public Utilities Commission order. The conservation of the taxpayers' purse is insufficent grounds to sustain a burden upon the commerce clause. See, e.g., Edwards v. California, 314 U.S. 160 (1941) (invalidating state statute that prohibited anyone from bringing an indigent person into California, despite the Court's

acknowledgment of the severity of the financial burden on the state which the statute sought to address.) See also, Memorial Hosiptal v. Maricopa County, 415 U.S. 250 (1974); and Shapiro v. Thompson, 394 U.S. 618 (1969). In the Memorial Hospital case, supra, in response to a constitutional challenge under the Equal Protection Clause, the Court ruled that constitutional rights may not be impaired to conserve the public fisc:

> The conservation of the taxpayers' purse in simply an insufficient state interest to sustain a durational residence requirement which, in effect, severely penalizes exercise of the right to freely migrate and settle in another State.

Id., 415 U.S. at 263.

Accordingly, the exclusion of the City of Philadelphia's and all other out-of-state solid waste from Kinsley Landfill by the New Jersey courts is a blatant act of eco-

nomic protectionism which constitutes a per se violation of the Commerce Clause.

**II. This Court has consistently declared violative of the Commerce Clause, the acts of state legislatures and of state judiciaries which confer upon their respective residents a preferred right of access over out-of-state consumers to privately owned resources.**

It is well established that the Commerce Clause "precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom." New England Power Co. v. New Hampshire, supra, 455 U.S. at 338 (citations omitted). Moreover, there exists a basic principal of Commerce Clause jurisprudence that a "State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of

the State." Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 10 (1928)).

In support of the propriety of the trial court's preliminary injunction, the New Jersey Supreme Court relied heavily upon this Court's opinion in Sporhase v. Nebraska, 458 U.S. 941 (1982). In that case, the Court held that the reciprocity requirement of a Nebraska statute regulating the withdrawal and transportation of ground water across the state's boundaries violated the Commerce Clause by imposing an impermissible burden upon interstate commerce. In Sporhase, the Court stated, however, that it was reluctant to condemn as unreasonable measures taken by a state to conserve and preserve "vital" resources for its own citizens, and that this reluctance stemmed from the "'confluence of [several] realities.'" Id., 458 U.S. at

956, quoting Hicklin v. Orbeck, 437 U.S. 518, 534 (1978). One such "reality" was that the resource which a state seeks to preserve for the use of its own citizens has "some indicia of a good publicly produced and owned." Id., 458 U.S. at 957, citing Reeves, Inc. v. Stake, 447 U.S. 429 (1980).

However, in the case now before this Court, no such public ownership of Kinsley Landfill is involved. Indeed, even the New Jersey Supreme Court has acknowledged that, even though it is subject to regulation by DEP and the state Board of Public Utility Commissioners, "Kinsley Landfill, Inc. (Kinsley) is a privately-owned landfill" (App. at 4A). Since no condemnation of Kinsley has ever been effected, the fact that Kinsley is subject to state regulation, as was the public utility in New

England Power Co. v. New Hampshire, supra, does not convert that landfill into "'a good publicly owned and produced,'" as the New Jersey Supreme Court has found. 495 A.2d at 58, quoting Sporhase v. Nebraska, supra, 458 U.S. at 597 (App. at 39A).

Indeed, this Court has previously rejected in Philadelphia v. New Jersey, supra, the very same argument put forth by New Jersey in support of this direct prohibition against all interstate commerce flowing into the Kinsley Landfill, namely, the need to conserve landfill sites in New Jersey, which are scarce resources, for the needs of local New Jersey communities.

The DEP report, adopted in its entirety by the trial court, states that:

> At present there is a critical shortage of solid waste disposal facilities in the State of New Jersey which has reached a crisis stage. There are very few operating landfills remaining in the State of New Jersey, and many of those that are remaining are

> rapidly running out of disposal capacity. At present, there are few proposals for additional landfills that have even reached the planning stage, and no additional landfills are presently under construction. A similar situation exists for resource recovery facilities. Resource recovery facilities are essential for a long-term solution to New Jersey's solid waste disposal crisis. (App. at 199A-200A).

The report reiterates the solid waste disposal crisis in New Jersey and then goes on to explain how the complete exclusion of interstate commerce would ameliorate temporarily the situation for New Jersey communities:

> Unfortunately, DEP review indicates that at present rates of waste disposal at the Kinsley Landfill, the capacity of one new lift might be reached in less than four months. Waste generated within the City of Philadelphia and other Pennsylvania communities accounts for the majority of the waste disposed of at the Kinsley Landfill. Accordingly if Kinsley Landfill ceased accepting this waste, it is projected that the capacity of the expanded landfill would not be reached for approximately one year.

> Again we note the critical shortage of landfill disposal space within the State of New Jersey. Protection of the public health, safety and welfare presents an urgent need to preserve this limited space so that it will be possible to provide some place for the disposal of solid waste generated within this State until long-term solutions to this waste disposal crisis are implemented. (App. at 203A-204A).

The scarcity of private landfills in New Jersey was rejected in this Court's opinion in Philadelphia v. New Jersey, supra, as a justification, in the face of a challenge under the Commerce Clause, for reserving private resources for the sole benefit of New Jersey communities at the expense of out-of-state waste generators:

> The New Jersey law at issue in this case falls squarely within the area that the Commerce Clause puts off limits to state regulation. On its face, it imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space. It is true that in our previcus cases the scarce natural resource was itself the article of commerce, whereas here the scarce

> resource and the article of commerce are distinct. But that difference is without consequence. In both instances, the State has overtly moved to slow or freeze the flow of commerce for protectionist reasons. It does not matter that the State has shut the article of commerce inside the State in one case and outside the State in the other. What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.

Philadelphia v. New Jersey, supra, 437 U.S. at 628 (emphases added).

Similarily, in Pennsylvania v. West Virginia, 262 U.S. 553 (1923), a West Virginia statute prohibited the exportation of its natural gas unless an adequate supply was available to meet the needs of its citizens. Although the Court recognized that "the gas is a natural product of the state and has become a necessity therein, that the supply is waning and no longer sufficient to satisfy

local needs and be used abroad, and that the act is therefore a legitimate measure of conservation in the interest of the people of the state," the statute was nonetheless found to be violative of the Commerce Clause. Id., 262 U.S. at 598 (emphasis added). The Court's abhorence to acts conferring this type of local preference is well documented. See, e.g., Hughes v. Oklahoma, supra, 441 U.S. at 322 (declaring unconstitutional a statute prohibiting transport or shipment outside of the state of minnows seized or procured within state waters); Foster-Fountain Packing Co. v. Haydel, supra, 278 U.S. 1 (1928) (invalidating a statute requiring shrimp processing to be done in-state); and West v. Kansas Natural Gas Co., 211 U.S. 229 (1911) (statute proscribing the exportation of natural gas outside of the state declared unconstitutional.)

To permit a state to retain its resources within its boundaries for the exclusive use of its own residents is to defeat the unifying purpose of the Commerce Clause and to invite the division and retaliatory behavior on the part of the other states.

> If the States have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle? ... To what consequence does such power tend? If one state has it, all states have it; embargo may be retaliated by embargo and commerce will be halted at state lines. And yet we have said that 'in matters of foreign and interstate commerce there are no state lines' ... But rather let us say it is constituted of the welfare of all of the States and that each State is made greater by a division of its resources, natural and created, with every other state, and those of every other state with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States.

West v. Kansas Natural Gas Co., supra, at 221 U.S. at 255 (emphasis added).

Accordingly, because it gives local New Jersey communities a preferential right of access to Kinsley, a privately owned landfill, to the exclusion of all out-of-state waste generators, the November 13, preliminary injunction violates the Commerce Clause.

**III. The November 13, 1984 preliminary injunction cannot withstand constitutional challenge even under the more flexible standard of Pike v. Bruce Church, Inc.**

Where the state act, which affects interstate commerce, regulates interstate and intrastate commerce evenhandedly, and where the act advances a legitimate state concern, the constitutional question may be resolved by employing the balancing test articulated in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. ... If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Accord, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471, (1981); Hughes v.

Oklahoma, supra, 441 U.S. at 336; Philadelphia v. New Jersey, supra, 437 U.S. at 624.

The threshold inquiry under the Pike test is whether the preliminary injunction regulates commerce evenhandedly. The lack of "evenhandedness" is established by showing that the New Jersey court's order does not impose incidental effects upon interstate commerce, but rather "discriminates against interstate commerce either on its face or in practical effect." Hughes v. Oklahoma, supra, 441 U.S. at 336. As petitioner has set forth above at pages 28-36, the order in question possesses both a discriminatory purpose and a discriminatory impact. The November 13 order prohibits the flow of all interstate commerce into Kinsley Landfill, while permitting the flow of virtually all intrastate commerce

into the landfill. The order overtly blocks the flow of interstate commerce at New Jersey's boundaries. New Jersey's contention that the preliminary injunction is directed toward and impacts intrastate commerce as well as interstate commerce lacks merit. The original order permitted generators of 94% of the New Jersey solid waste that had formerly found its way to Kinsley to continue to dispose of their waste there. As that order was modified on November 29, virtually all of the communities which generated the remaining six percent of the New Jersey waste disposed of at Kinsley were allowed to resume their disposal activities at the landfill.

Contrary to the view of the New Jersey Supreme Court, the burden imposed upon interstate commerce is not incidental. The state court's reasoning with respect to

this matter is patently disingenuous:

> Were it not for the injunction . . . the landfill would be closed not only to former customers outside the tri-county area, such as Philadelphia, but also to those within the three counties. So considered, the effect of the injunction on interstate commerce is incidental.

495 A.2d at 58 (App. at 24A). The test of whether a burden on commerce is incidental or not is whether there exists a direct regulation of commerce or whether the effect on commerce is merely incidental to a neutral regulation. See Pike v. Bruce Church, Inc., supra, and progeny. This distinction was recently elaborated on by this Court in Edgar v. Mite Corporation, 457 U.S. 624, 640 (1982):

> The Commerce Clause . . . permits only incidental regulation of interstate commerce by the States; direct regulation is prohibited. ... The Illinois Act violates these principles for two reasons. First, it directly regulates and prevents, unless its terms are

> satisfied, interstate tender offers which in turn would generate interstate transactions.

Id. (citations omitted)(emphasis in original). Similarly, in Shafer v. Farmers Grain Co., 268 U.S. 189, 199 (1925), this Court stressed that "a state statute which, by its necessary operation, directly interferes with or burdens such commerce is a prohibited regulation and invalid, regardless of the purpose for which it was enacted." Id.(emphasis added).

With respect to the instant case, where the necessary result of the preliminary injunction is to proscribe the flow of all relevant interstate commerce into Kinsley Landfill, the impermissibility of the burden is unquestionable.

> Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states.

> Such an obstruction is direct by the very terms of the hypothesis.

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935). Consequently, the more flexible balancing test set forth in Pike is not applicable to the matter at hand.

Although, as set forth above, the injunction is not entitled to the more flexible balancing test, for argument's sake, petitioner will address the remaining elements of the Pike standard.

Once the party challenging the state's action demonstrates the discrimination against interstate commerce, "the burden falls on the State to justify it both in terms of the local benefits flowing from the statute [in this instance the preliminary injunction] and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." Hunt v. Washington

State Apple Advertising Commission, supra, 432 U.S. at 353. See Hughes v. Oklahoma, supra, 441 U.S. at 336.

The purported legitimate state concern underlying the extraordinary judicial relief granted in the instant case is one of concern for the exhaustion of finite landfill space in New Jersey. Assuming, arguendo, that the concern as expressed above is a legitimate concern, the judicial order still fails to survive constitutional muster because of the means chosen to effectuate it. As this Court stated in Philadelphia v. New Jersey:

> This dispute about ultimate legislative purpose need not be resolved, because its resolution would not be relevant to the constitutional issue to be decided in this case. Contrary to the evident assumption of the state court and the parties, the evil of protectionism can reside in legislative ends. Thus, it does not matter whether the ultimate aim of ch 363 is to reduce the waste disposal costs of New Jersey residents or to save remaining

> open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of all waste into the State's remaining landfills, even though interstate commerce may incidentally be affected. But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.

Philadelphia v. New Jersey, supra, 437 U.S. at 626-627. The injunctive means which New Jersey has employed in the proceedings below to protect its communities' interests in a scarce resource is prohibited by the Commerce Clause and cannot be excused by the cry of public good, because "[a] presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the State from the national economy." Id., 437 U.S. at 627. The New

Jersey court's order, intended to preserve landfill capacity at Kinsley, discriminates against solid waste generated outside of the New Jersey borders not on the basis of the content or nature of such waste, but simply on the basis of its origin.

In order to have avoided illegitimate means to achieve its purpose, the New Jersey trial court was constrained to select the means which had the least impact upon interstate commerce. See Hughes v. Oklahoma, supra, 441 U.S. at 338. In the New Jersey court proceedings, petitioner proferred several examples of viable solutions which would have had a less severe impact on interstate commerce than does the preliminary injunction ordered by the court, including (1) the creation of additional capacity at Kinsley by means of a second vertical expansion; and (2) per-

mitting Philadelphia, as well as the New Jersey communities, to utilize Kinsley Landfill at reduced levels. On the question of increasing Kinsley's capacity, the trial judge found that "the design of a second lift and the approval of the same and its subsequent implementation is not relevant to the City of Philadelphia . . . ." Stenographic Transcript of Decision of Superior Court of New Jersey, Law Division, Gloucester County (November 21, 1984) at 70-71. Similiarly, the City's request for an across-the-board proportional allocation of the available space at Kinsley Landfill was also rejected, without a judicial determination of the effect such a plan would have had on the alleged immediate and irreparable harm to plaintiffs below.

Thus, even under the flexible Pike standard, the order of the New Jersey trial

court cannot withstand a constitutional challenge.

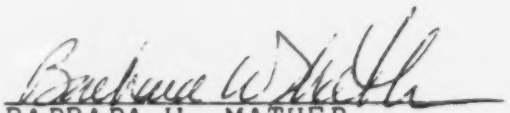
## CONCLUSION

The state of New Jersey has attempted to isolate itself from the growing national concern for the disposal of solid waste. The extraordinary injunctive measure taken by the New Jersey Superior Court in barring the City of Philadelphia and all other out-of-state waste generators from disposing of their solid waste at Kinsley Landfill, in order to conserve New Jersey's landfill resources for New Jersey communities, is an anathema to the Commerce Clause of the United States Constitution. Moreover, such action by the state court merely sets the stage for further parochial disharmony among states over this grave national problem, in contravention of this Court's opinion in Philadelphia v. New Jersey. Accordingly, petitioner, City of Philadelphia, requests that this Court grant

it a hearing on the merits of this matter so that the decision of the Supreme Court of New Jersey may be reversed.

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment and the opinion of the New Jersey Supreme Court.

Respectfully submitted,



BARBARA W. MATHER
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Attorney for Petitioner

85-707 (2)

Supreme Court, U.S.
FILED
OCT 10 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CITY OF PHILADELPHIA,
*Petitioner,*

*v.*

BOROUGH OF GLASSBORO, et al.,
*Respondents.*

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Petition for Writ of Certiorari
to the Supreme Court of New Jersey

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SUPREME COURT OF NEW JERSEY
A-179
September Term 1984

BOROUGH OF GLASSBORO, a Municipal Corporation of the State of New Jersey, and the BOARD OF HEALTH OF THE BOROUGH OF GLASSBORO,

Plaintiffs-Respondents,

and

BOROUGH OF CLAYTON, a Municipal Corporation of the State of New Jersey, and TOWNSHIP OF MONROE, a Municipal corporation of the State of New Jersey,

Plaintiffs-Intervenors
Respondent ,

v.

GLOUCESTER COUNTY BOARD OF CHOSEN FREEHOLDERS and THE COUNTY OF CAMDEN,

Defendants,

and

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, ROBERT E. HUGHEY, Commissioner of the New Jersey Department of Environmental Protection, and KINSLEY LANDFILL, INC.,

Defendants-Respondents,

and
THE CITY OF PHILADELPHIA,

Defendant-Appellant,

and

TOWNSHIP OF DEPTFORD,

Defendant-Intervenor
Respondent.

Argued May 7, 1985 -- Decided July 10, 1985

On appeal from the Superior Court, Appellate Division, whose opinion is reported at 199 N.J. Super. 91 (1985)

Barbara W. Mather, City Solicitor, a member of the Pennsylvania bar, argued the cause for appellant (Tomar, Parks, Seliger, Siminoff & Adourian, attorneys; Steven K. Kudatzky and James Katz, of counsel and on the brief).

Joseph F. Lisa argued the cause for respondents Borough of Glassboro, etc., et al. and intervenors-respondents Borough of Clayton, etc., et al.

Paul H. Schneider, Deputy Attorney General, argued the cause for respondent New Jersey Department of Environmental Protection, et al. (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; Michael R. Cole, First Assistant Attorney General, of counsel).

Timothy S. Haley argued the cause for intervenor-respondent Township of Deptford (Gordon & Gordon, attorneys).
Charles C. Carella submitted a brief on behalf of respondent Kinsley landfill, Inc. (Carella, Byrne, Bain & Gilfillan, attorneys; Mr. Carella and Brendan T. Byrne, of counsel and on the brief).

The opinion of the Court was delivered by POLLOCK, J.

On this appeal, the City of Philadelphia (Philadelphia) asks us to review a preliminary injunction closing the Kinsley Landfill in Deptford Twonship, Gloucester County. Seven months ago, we denied Philadelphia's request for a stay of the injunction. 98 N.J. 186 (1984). Thereafter, a single United States Supreme Court Justice also denied Philadelphia's request for a stay.

In the present appeal, as in its former application, Philadelphia contends that the injunction, which permits certain New Jersey municipalities to use the landfill as an emergency health measure, imposes an impermissible burden on interstate commerce. Specifically, Philadelphia con-

tends that the closure order violates the Commerce Clause of the federal constitution, U.S. Const. art. I, § 8, cl. 3. Impressed with the public health emergency that confronted the trial court, the Appellate Division affirmed the injunction. 199 N.J. Super. 91 (1985). We affirm the judgement of the Appellate Division.

I

Kinsley Landfill, Inc. (Kinsley) is a privately-owned landfill that is subject to regulation by the New Jersey Department of Environmental Protection (DEP) as to environmental concerns and by the Board of Public Utility Commissioners (BPU) as to economic matters. For approximately twenty-five years, Kinsley has operated as a major solid waste disposal site in souther New Jersey. On September 26, 1980, DEP issued a permit authorizing the dumping

of solid waste at the landfill to a height of 164 feet. By the spring of 1984, garbage had accumulated nearly to the approved limit. Virtually all the solid waste generated within.
New Jersey that is deposited at the landfill emanates from Gloucester, Camden, and Salem counties (hereinafter described sometimes as "the three counties").

On October 11, 1984, Kinsley notified its customers that it would soon reach the 164-foot limit and that it would close on October 28, 1984. Shortly thereafter, the Borough of Glassboro (Glassboro), one of the municipalities disposing of of solid waste at Kinsley, instituted this action to enjoin both the closure of the landfill and the use of the landfill for solid waste originating in Philadelphia. The defendants included Philadelpia, Deptford

Township, and DEP. Various other parties were joined or have intervened in the proceedings.

The trial court conducted hearings over several days on Glassboro's request for a temporary restraining order. On October 26, 1984, two days before the announced closure of the landfill, the court rendered its decision and issued the order. The court found that Kinsley was rapidly approaching the end of its useful life and that it should be closed. Although it recognized that continued use beyond the current design threatened the health and safety of the citizens of Deptford, the court found that immediate closure would cause irreparable harm to the citizens of Glassboro and certain other municipalities. The court concluded that the most equitable response was to restrain

the closure and direct Gloucester County to establish "a reasonable site for alternate solid waste disposal." The court reserved decision on the application for restraints against Philadelphia.

Pursuant to a suggestion made by Kinsley's engineer, the court ordered Kinsley to submit to DEP engineering plans for an additional sixteen-foot lift, one that would expand the height of the landfill to 180 feet. In accordance with the court order, DEP reviewed the plans and submitted a report for the court's consideration in connection with the application for a preliminary injunction.

The report cited, among other things, that no acceptable alternate landfill existed in New Jersey for the disposal of solid waste dumped at Kinsley. Consequently, the three counties should

expeditiously site and implement landfills within their respective borders. Although DEP procedures for opening a landfill ordinarily take two years, DEP would process the applications on an emergent basis, and the counties could open alternate landfills by November 1985. In the interim, Kinsley could accommodate a sixteen-foot vertical expansion.

At the hearing on the application for the order under review, the court accepted the DEP report in its entirety and, consistent with that report, made certain findings. We accept those findings and the inferences that the trial court drew from them as supported by substantial credible evidence. Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 483-84 (1974). Most importantly, the trial court found that at then current levels of dumping at Kinsley,

the additional capacity created by the sixteen-foot lift would be reached in three and one-half months. Most of the solid waste formerly dumped at the landfill emanated from Pennsylvania, with Philadelphia alone providing 53.9% of the 4,738,783 cubic yards of waste dumped in the period from July 1, 1983 to May 31, 1984. According to waste flow registration statements filed by Philadelphia with DEP, this volume represents a dramatic increase over Philadelphia's prior use of the landfill. In 1981-82, for example, Philadelphia disposed of 784,770 cubic yards of waste at Kinsley, and, in 1982-83, this figure grew to 1,136,785 cubic yards. Accordingly, the trial court found that the disposal of waste by Philadelphia at the landfill had "continued to escalate at an alarming rate unlike those districts subject to inter-district agreements."

Furthermore, since 1980, DEP had required that Philadelphia, like the adjoining New Jersey counties, sign an interdistrict waste flow agreement with Gloucester as a condition of continued use of the Kinsley Landfill. Nowwithstanding DEP's urging, Philadelphia had not executed an inter-district agreement, the basic instrument under the Solid Waste Management Act, N.J.S.A. 13-1E-1 to -38, for planning for the disposal of solid waste generated outside a district such as Gloucester County. Rejecting one of Philadlephia's contentions, the court found that Gloucester County had negotiated with Philadelphia in good faith.

Also consistent with the DEP report, the trial court found that Philadelphia, unlike the municipalities in the tri-county area, could accommodate the closure of the

Kinsley Landfill. Even when Kinsley was operating under a DEP permit, Philadelphia sent half of its garbage elsewhere. Philadelphia not only enjoys access to alternative sites, but also to equipment for routing its solid waste elsewhere. In contrast, the tri-county municipalities do not own the trucks, transfer stations, or resources necessary for dumping at more distant sites. As the Appellate Division recited, fifty-nine municipalities in the tri-county area had no alternative to Kinsley. 199 N.J. Super. at 100.

In view of these findings, the trial court decided that the most equitable result was to exclude from Kinsley solid waste originating from Philadelphia and from other municipalities, both within and without New Jersy. The result of that decision was to extend the life of the

landfill for one year, the time needed by the three counties to establish alternative sites.

Consequently, on November 13, 1984, the court issued a preliminary injunction providing, in effect, that:

(1) Municipalities in Gloucester, Camden, and Salem counties could continue to use Kinsley to dispose of solid waste for an additional sixteen-foot lift. The three counties must proceed immediately, within their respective borders, to establish landfills, which are to be operational by November 1985. (As the Appellate Division noted, 199 N.J. Super at 97, two Gloucester municipalities must exhaust the capacity at their municipally-owned landfills before

they can resort to Kinsley. See N.J.A.C. 7:26-6.5h, 2, 3, 4.)

(2) Kinsley was to cease accepting solid waste generated within Philadelphia, other Pennsylvania communities, and any other district outside of Gloucester County that is not subject to an interdistrict agreement.

(3) All communities using Kinsley should be required "to maximize" their recycling efforts, including the adoption of mandatory recycling ordinances and curbside pickup.

(4) When the sixteen-foot vertical expansion was reached, Kinsley was to close, at which time waste was to be redirected to the landfills. This was expected to occur by November 1985.

(5) Kinsley was to be closed for all sludge disposal on March 15, 1985.

Understanding the legal significance of the preceding facts begins with the recognition that New Jersey is in the throes of a solid waste crisis. In our earlier decision reviewing the injunctive order, we summarized the background of that crisis:

> The Order that is the subject of these applications must be examined in the light of the critical Statewide concerns relating to solid waste disposal, noted as early as 1974 by this Court in Southern Ocean Landfill v. Mayor of Ocean Tp., [sic] 64 N.J. 190, 193, and again, eight years later, in A.A. Mastrangelo, Inc. v. Environmental Protection Dep't, 90 N.J.

666 (1982). In particular, the Order must be viewed within the framework of N.J.S.A. 13:1E-1 to -38, the Solid Waste Management Act. This Act was passed by the Legislature in recognition of the fact that the management of solid waste disposal in New Jersey had consisted largely of haphazard, random, uncoordinated activities undertaken with little, if any, regard for regional planning and coordination. N.J.S.A. 13:1E-2a. In order to protect the public health, safety, and welfare, the Act establishes the policy of New Jersey to provide a coordinated approach to solid waste disposal by establishing 22 solid waste management districts (consisting of 21 counties and the Hackensack Meadowlands district), each of which is charged

with the responsibility of developing and implementing comprehensive solid waste management plans that meet solid waste disposal needs. N.J.S.A. 13:1E-2b(2).

[98 N.J. at 191-92.]

* * * * * * * * *

The Solid Waste Management Act contemplates that when solid waste is transported into a solid waste management district it must be pursuant to an interdistrict agreement. N.J.S.A. 13:1E-21b(3). According to the Department, a district cannot effectively plan for the solid waste disposal facilities that are needed to meet waste to meet waste disposal needs unless it knows how much waste will be entering the district from various sources.

[Id. at 192-93.]

The Appellate Division likewise recognized the importance of planning and the vital role of interdistrict agreements in gaining control of the solid waste crisis. 199 N.J. Super. at 97-98. Nonetheless, that court did not rest its decision on the absence of an agreement with Philadelphia, id. at 103, but on the existence of an "imminent public health and welfare crisis," id. at 99. In affirming the order permitting the temporary use of the landfill to avert a public health crisis, the Appellate Division concluded that the trial court had struck a proper balance of the equities. Id. at 100. It remains for us to determine whether the order under review is consistent with the mandate of the Commerce Clause.

II

The Commerce Clause provides simply that: "The Congress shall have Power * * * to regulate Commerce * * * among the States." When Congress has not exercised its preemptive power, many subjects affecting interstate commerce, particularly those of local concern, remain subject to state control. See Sporhase v. Nebraska, 458 U.S. 941, 954, 73 L.Ed.2d 1254, 1264 (1982); Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 349-50, 53 L.Ed.2d 383, 398-99 (1977). Although Congress has enacted legislation pertaining to solid waste, 42 U.S.C.A. § 6901 to -87, it has not preempted, but rather encouraged, state regulation of interstate waste. See Philadelphia v. New Jersey, 437 U.S. 617, 620 n.4, 57 L.Ed.2d 475, 479 n.4 (1978).

When confronted with congressional silence, states remain constrained, nonethe-

less, by the "dormant" character of the Commerce Clause. Wilson v. Black Bird Creek Marsh Co., 27 U.S. 412 (2 Pet 245) (1829); see G. Gunther, Constitutional Law 278-80 (1975). In its dormant state, the Commerce Clause acts as a "self-executing limitation on the power of the States to enact laws imposing substantial burdens on [interstate] Commerce." South Central Timber Dev., Inc. v. Wunnicke, 467 U.S. ____, 81 L.Ed.2d 71, 76 (1984); Hughes v. Oklahoma, 441 U.S. 332, 326, [sic] 60 L.Ed.2d 250, 255-56 (1979).

As a general proposition, a state regulation will be sustained if it is rationally related to a legitimate state end and if the state interest in enforcing the regulation outweights the burden on interstate commerce. L. Tribe, American Constitutional Law § 6-5, at 326 (1978).

Thus, Commerce Clause analysis often involves balancing the national need for the free flow of trade with the local concern of individual states to protect the health, safety, and welfare of their citizens. Nowhere is that balance more critical than in weighing the national interest against the substantial local interest in the proper disposal of solid waste. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471, 473, 66 L.Ed.2d 659, 673, 675 (1981), reh'g denied, 68 L.Ed.2d 222 (1982).

At the outset, we must determine whic of two standards applies to our appraisal of the effect of the injunction on interstate commerce. The first standard, applicable when a state regulation manifests simple economic protectionism, results in a virtual per se rule of invali

dity. Minnesota v. Clover Leaf Creamery Co., supra, 449 U.S. at 471; Philadelphia v New Jersey, supra, 437 U.S. at 624, 57 L.Ed.2d at 481. Economic protectionism has been proved by establishing that a statute has either a discriminatory effect, Hunt v. Washington Apple Advertising Comm'n, supra, 432 U.S. 333, 53 L.Ed.2d 383, or a discriminatory effect, Philadelphia v. New Jersey, supra, 437 U.S. 617, 57 L.Ed.2d 475. The initial burden to demonstrate discrimination rests with the party attacking the state regulation. Hughes v. Oklahoma, supra, 441 U.S. at 336, 60 L.Ed.2d at 262. Once discrimination is shown to exist, however, the burden falls on the state to justify the regulation both in terms of the local benefits it provides and the unavailability of nondiscriminatory alternatives. Id. (quoting Hunt v.

Washington Apple Advertising Comm'n supra, 432 U.S. at 353, 53 L.Ed. at 400); see Sporhase v. Nebraska, supra, 458 U.S. at 957, 73 L.Ed.2d at 1266-67; U.S.A. Chamber of Commerce v. State, 89 N.J. 131, 162 (1982).

A second, more flexible, standard aplies when a state regulation advances legitimate local interests and does not facially discriminate against interstate commerce:

> Where the statute regulates evenhandedly
>
> > to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.
>
> [Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 25 L.Ed. 2d 174, 178 (1970)

(citation omitted.)

See Minnesota v. Clover Leaf Creamery Co., supra, 449 U.S. at 471; Philadelphia v. New Jersey, supra, 437 U.S. at 624. We discern some overlap in the application of the two standards. In determining whether a state regulation is discriminatory in purpose or effect, for example, we consider some of the same factors involved in determining whether a local concern is genuine and whether the regulation operates evenhandedly. Our initial task is to determine whether the injunction is, as Philadlephia contends, "blatantly discriminatory and protectionist on its face and in its effects," or whether it operates evenhandedly to advance the legitimate local interests of the three counties. See Hughes v. Oklahoma, supra, 441 U.S. at 336, 60 L.Ed.2d at 262.

In making that determination, we must consider the purpose of the injunction and its effect on interstate commerce. Its purpose is to permit emergency access to Kinsley for the protection of the health, safety, and welfare of a limited number of municipalities in the tri-county area that have no alternative means of disposing of solid waste. Although the injunction permits those municipalities to avail themselves of Kinsley, they may do so only on an emergent basis and only by assuming, together with the three counties, substantial obligations. For example, the three counties must establish alternative sites within a year, a timetable that requires accelerated efforts by both DEP and those counties. In addition, all municipalities using Kinsley must make maximum efforts to recycle disposable waste, including curb-

side pickup. Furthermore, the BPU has increased the "tipping fees" (the amount paid to dump) at Kinsley from $2.85 to $10 per-cubic-yard to accommodate the costs of an environmentally-sound closure, estimated at $7.47 per-cubic-yard. See BPU Interim Order, Docket No. 8411-1205, In re matter of the Petition of Kinsley's Landfill, Inc. (Jan. 7, 1955). Thus, the municipalities have incurred a three-fold cost increase to continue dumping at Kinsley. Stated plainly, the purpose of the injunction is to borrow a few extra months from a virtually exhausted resource, a landfill that would otherwise be closed. In effect, the injunction treats Philadelphia like the thirteen New Jersey counties that formerly used Kinsley.

To support its argument that the injunction discriminates against interstate

commerce, Philadelphia relies on Philadelphia v. New Jersey, supra, 437 U.S. 617, 57 L.Ed.2d 475, in which the United States Supreme Court reviewed a statute that, with narrow exceptions, excluded from New Jersey all out-of-state waste. The effect of the statute was to prevent Philadelphia from sending its garbage anywhere in New Jersey. In a divided opinion, the Supreme Court found that the statute violated the Commerce Clause. 437 U.S. 617, 57 L.Ed.2d 475. Although New Jersey defended the statue as an environmental protection measure, Justice Stewart declared that whether the statutory objective was to reduce waste disposal costs or to protect open land from pollution, the State could not achieve its objective by discriminating against interstate commerce. Id. at 626-27, 57 L.Ed.2d at 483. He

observed, however, that a statute regulating the flow of articles of commerce might be upheld when there was "some reason, apart from their origin, to treat them differently." Id. at 627, 57 L.Ed.2d at 433; cf. United Bldg. & Constr. v. Major & Council of Camden, 465 U.S. 208, ___, 79 L.Ed.2d 249, 261-62 (1984) (under Privilege and Immunities clause, municipal may discriminate against out-of-state residents on its construction projects "where there is a 'substantial reason' for the difference in treatment").

Consistent with that observation, several reasons compel the conclusion that the place of origin is unrelated to the injunction against the continued dumping of Philadelphia garbage at Kinsley. Here, we are not confronted with a ban on all out-of-state garbage as we were in

Philadelphia v. New Jersey. Thirteen New Jersey counties, which account for approximately 6.1% of the waste disposed of at Kinsley, also are excluded. Furthermore, that Philadelphia, as the biggest former customer, may feel the burden more heavily does not vitiate the substantial interest of New Jersey in protecting the health of Salem, Gloucester, and Camden counties. Minnesota v. Clover Leaf Creamery Co., supra, 449 U.S. at 473, 63 L.Ed.2d at 678. If no state line existed between New Jersey and Pennsylvania, we would uphold the injunction as a valid exercise of the powers of a court of equity. As an equitable remedy, the decree merely preserves space at Kinsley for certain municipalities that, as a practical matter, do not have access to other landfills, while remitting other municipalities, including

Philadelphia, to alternative sites. Additional garbage from any source, either within or outside New Jersey, will displace space at Kinsley needed to avert a health crisis in the three counties. In avoiding that crisis, the injunction also effectuates the legislative and regulatory scheme for the disposal of solid waste.

The mere fact that Philadelphia is in another state should not imbue it with greater rights than it would possess if it were located in New Jersey. The Commerce Clause was intended as a shield against discrimination, not as a sword to obtain a preference. We conclude that the injunction is not discrimatory in purpose or effect. It is plainly not a mere protectionist measure and, therefore, does not constitute a per se violation of the Commerce Clause. Philadelphia v. New Jersey, supra, 57 L.Ed.2d at 481.

It remains to determine whether the state interest in enforcing the injunction outweighs the burden on interstate commerce under the Pike test. Pike v. Bruce Church, Inc., supra, 397 U.S. at 142, 25 L.Ed.2d at 178. That test, like the per se test, begins with a consideration of the legitimacy of the local interest sought to be protected. One would be hard pressed to discover a more legitimate state interest than that of protecting the health of the citizenry, an interest that can manifest itself in the conservation of natural resources such as water, Sporhase v. Nebraska, supra, 458 U.S. at ___, 73 L.Ed.2d at 1265, or in the preservation of diminishing sources of waste disposal, Minnesota v. Clover Leaf Creamery Co., supra, 449 U.S. at 471, 66 L.Ed.2d at 673.

The threshold question arises, nonetheless, whether the injunction opera-

tes evenhandedly. Pike v. Bruce Church, Inc., supra, 397 U.S. at 142, 25 L.Ed.2d at 178. In answering that question, we look to the nature of the local problem and the character of the state response. See Sporhase v. Nebraska, supra, 485 U.S. at 954-56, 73 L.Ed.2d at 1265-66. In Sporhase, for example, a Nebraska statute required a permit issued by the Department of Water Resources to transport ground water from Nebraska to another state. Under the statute, the director of the department would issue a permit if he found the withdrawal of the ground water to be "reasonable, not contrary to the conservation and use of ground water, and not otherwise detrimental to the public welfare." Even after making those findings, however, a permit would not issue unless the receiving state granted recipro-

cal water rights to Nebraska. Id. at 944, 73 L.Ed.2d at 1258.

The Court invalidated the reciprocity requirement because it imposed as absolute ban that was not narrowly tailored to serve the state's legitimate interest in water conservation and preservation. 458 U.S. at 957-58, 73 L.Ed.2d at 1266-67. It sustained as evenhanded, however, the statutory delegation of authority to the Nebraska Department of Water Resources (Department) to deny permits to out-of-state applicants. Id. at 955, 73 L.Ed.2d at 1265. Although the effect of the statute was to allow the Department to reserve water for use in Nebraska, other restrictions on intrastate use demonstrated that the genuine purpose of the statute was not to protect the state's economy, but to conserve inadequate ground water supplies.

Id. at 954-56, 73 L.Ed.2d 1265-66. In short, the water conservation program operated evenhandedly by distributing burdens, albeit different ones, on in-state and out-of-state users.

In addition to finding that the intrastate restrictions demonstrated the genuineness of the local purpose, the Court found that "a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State. An exemption for interstate transfer would be inconsistent with the ideal of evenhandedness. Id. at 956, 73 L.Ed.2d at 1265. Noting that Congress had not expressed a contrary view, the Court stated it was "reluctant to condemn as unreasonable measures taken by a State to

conserve and preserve for its own citizens this vital resource in times of severe shortage." Id., 73 L.Ed. at 1266.

In considering the lessons of Sporhase, we accept the trial court's finding that the tri-county municipalities need access to Kinsley to avert a health crisis. Kinsley is the only feasible place in which the tri-county municipalities can dispose of their solid waste. Given that need and the decreasing number of landfills, Kinsley may properly be characterized as a vital resource in a time of severe shortage. See Id at 956, 73 L.Ed.2d at 1266. It was that need that led the trial court to foreclose municipalities outside the tri-county area, whether within or outside New Jersey, from continuing to dump at Kinsley. As the trial court found, garbage would accumulate in the streets of Salem, Gloucester, and

Camden counties if those municipalities could not use the additional sixteen-foot lift. Moreover, as previously indicated, the injunction imposes substantial obligations on the tri-county municipalities and on Salem, Gloucester and Camden counties. Thus, like the water conservation scheme in Sporhase, the injunction effects an evenhanded distribution of its burdens.

We also find instructive four factors considered by the United States Supreme Court in sustaining the conservation measures in Sporhase v. Nebraska, supra, 458 U.S. at 956-57, 73 L.Ed.2d at 1266. The first consideration is whether the restriction represents an exercise in economic protectionism or of the police power. As previously set forth, we find the injunction to be a measured response to a genuine local health problem.

The second consideration is the existence of a legal expectation that the use of a landfill such as Kinsley might be restricted. Here, state and local legislators have created the legal expectation that state and local governments will manage the disposal of solid waste. See Central Iowa Refuse Systems, Inc. v. Des Moines Metro Solid Waste, 715 F.2d 419 (8th Cir. 1983) (restraint in waste flows essential to development of comprehensive waste flow plan); compare N.J.S.A. 13;1E-2 (each county designated as a solid waste district, and DEP is to regulate and supervise the disposal of solid waste) with 42 U.S.C.A. §§ 6901-87 (federal legislation contemplates state imposed controls on waste flow). To manage solid waste, a state must have the power to regulate and even to close landfills. The denial of

continuing recourse to a landfill that has reached the limits imposed by its DEP permit should be well within the reasonable expectations of former users such as Philadelphia.

The third factor in Sporhase emanated from Nebraska's claim of ownership to the ground water. Justice Stevens acknowledged that the state's claim to public ownership, although not absolute, could "support a limited preference for its own citizens in the utilization of the resource." 458 U.S. at 956, 73 L.Ed.2d 1266. Here, Kinsley is not publicly owned, but it is a public utility, N.J.S.A. 48:2-13; N.J.S.A. 48:13A-1 to -12, and must operate in the public interest, N.J.S.A. 48:13A-1. Hence, New Jersey's interest in the use of the landfill is akin to Nebraska's interest in the use of its ground water.

The final consideration suggested by Sporhase is the extent of the state's efforts to conserve the resource. At Kinsley, the availability of the additional lift is not the result of happenstance, but of New Jersey's conservation efforts. In recent years, no problem in New Jersey has attracted more governmental attention than has solid waste management. Since 1974, this Court has urged other branches of government to address solid waste as a state-wide problem. Southern Ocean Landfill v. Mayor of Ocean Township, 64 N.J. 190, 193. Through the Solid Waste Management Act, N.J.S.A. 13:1E-1 to -38, the Legislature has created a statutory frame-work that enables state and local governments to solve the crisis. Interdistrict agreements comprise a key component of solid waste management.

Significantly, the trial court found that the solid waste generated by Camden and Salem counties, which executed such agreements, remained constant. In contrast, Philadelphia, which did not sign an interdistrict agreement, tripled the amount of garbage it dumped at Kinsley from 1981 to 1984. Thus, state supervision and county cooperation imbued Kinsley, although privately owned, with "some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage." Sporhase v. Nebraska, supra, 458 U.S. at 957, 73 L.Ed.2d at 1266. We conclude that the injunction may fairly be viewed as a reasonable measure taken to resurrect Kinsley for former users that have no other place to dump their garbage.

In reaching that conclusion, we remain cognizant that only in limited circumstan-

ces may a state accord preferential treatment to its own citizens. We are aware also that the loss of access to Kinsley will impose added costs on Philadelphia. Were it not for the injunction, however, the landfill would be closed not only to former customers outside the tri-county area, such as Philadelphia, but also to those within the three counties. So considered, the effect of the injunction on interstate commerce is incidental. Philadelphia v. New Jersey, supra, 437 U.S. at 624, 57 L.Ed.2d at 482; Pike v. Bruce Church, Inc., supra, 397 U.S. at 142, 25 L.Ed.2d at 178.

Even if the effect could be characterized as more than incidental, the burden falling on Philadelphia would not be "clearly excessive." Pike v. Bruce Church, Inc., supra, 397 U.S. at 142, 25

L.Ed.2d at 178. Philadelphia's lost access to an exhausted landfill must be contrasted with the disastrous results that its continued use would visit on the tri-county municipalities. With respect to the economic impact of the closure, the Appellate Division observed that Philadelphia, a city of Approximately 1.7 million people with a solid waste disposal budget of approximately $4,000,000, would suffer much less than the 59 municipalities in the tri-county area. 199 N.J. Super. at 100.* The

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* The Appellate Division of the New Jersey Superior Court actually found that the closing of Kinsley would increase the City of Philadelphia's Streets Department budget by 5% of $91 million dollars or $4 million in the first year and not that the Streets Department's existing budget was $4 million. Glassboro v. Gloucester County Board of Freeholders, 199 N.J. Super. 91, 100, 488 A.2d 369, 567 (1985). (Footnote supplied.)

estimated increase in Philadelphia's budget for solid waste disposal is 5% for the first year following Kinsley's closure and 2% thereafter. Id. By contrast, the solid waste disposal budget of Glassboro, a municipality of some 14,500 people, "could excalate from $100,000 to $1,000,000 per year * * *, * and the cost to Camden County, with a population of approximately 500,000 people, could increase from $3,000,000 to $12,000,000 annually. Id.

The closure of Kinsley, however, involves more than cost considerations. It would force the tri-county municipalities to embark on a crash garbage disposal program, one that would include, for example, siting and establishing transfer stations to store garbage temporarily, pending delivery to a permanent site. Such a program, as formidable and costly as it

would be, would become obsolete in one year, when the new dump sites become operative. Furthermore, as the Appellate Division stated, "[s]ome towns, such as Clayton, Elmer, and Woodstown had no alternative to their present private-hauler service if Kinsley were closed without access to an alternate local source. The private haulers would simply close down." Id. Thus, practical considerations demonstrate that the task confronting the tri-county municipalities would be not merely difficult, but virtually impossible to perform. Such considerations confirm that the burden on Philadelphia is not excessive.

The final inquiry in evaluating a state conservation program under Pike is whether the local interest can be achieved as well with a lesser impact on interstate

commerce. Pike v. Bruce Church, Inc., supra, 397 U.S. at 142, 25 L.Ed. 2d at 78. Put differently, the question is whether a less discriminatory injunction might adequately protect the health of the citizens of southern New Jersey. See Hughes v. Oklahoma, supra, 441 U.S. at 336, 60 L.Ed.2d at 262.

In this regard, Philadelphia argues that all former users should be allowed continued access at proportionately reduced levels. At first glance, that argument appears to be fair. On closer examination, however, it becomes apparent that what is superficially fair is, in reality, a request for a preference. As stated previously, were it not for the emergent need of the three counties, Kinsley would be closed to all users. Use of Kinsley has been restricted for a limited time to avert

a public health crisis in southern New Jersey. Moreover, Philadelphia has alternative sites to dispose of its garbage, albeit ones that impose increased costs on the City. In contrast, the tri-county municipalities do not have access to alternative sites, to trucks, or to what may be of greater importance, to transfer stations.

The threat to local health, which the trial court described as raising a "horrendous specter," could not be averted by a less-restrictive injunction. See Sporhase v. Nebraska, supra, 458 U.S, at 957, 73 L.Ed.2d at 1267; Hughes v. Oklahoma, supra, 441 U.S. at 336, 60 L.Ed.2d at 261-62; Hunt v. Washington Apple Advertising Comm'n, supra, 432 U.S. at 353, 53 L.Ed.2d at 400. Based on the record before us, a plan that accorded to

Philadlephia access, even if proportionately reduced, would foreshorten the life of the landfill. Such a plan would not merely be a less effective means of obtaining time for the development of alternative sites; it would be ineffective. See Minnesota v. Clover Leaf Creamery Co., supra, 459 U.S. at 464, 473-74, 66 L.Ed.2d at 669, 675. So viewed, Philadelphia's demand that the tri-county municipalities incur substantial costs for a short-term solution is not so much a request for a less discriminatory alternative as it is an attempt to place an excessive burden on those municipalities. The ideal is evenhandedness. Sporhase v. Nebraska, supra, 458 U.S. at 956, 73 L.Ed.2d at 1265. That the injunction operates evenhandedly is apparent form the burden it places on the three counties to develop permanent alternatives.

Finally, Philadelphia contends that the trial court should have granted its motion filed on November 15, 1984, two days after the issuance of the injunction, in which the City sought approval of a second lift, one that would extend the height of the landfill by an additional sixteen feet. At a hearing on October 23, 1984, however, a DEP expert expressed substantial reservations about the environmental acceptability of a second lift. The trial court found the testimony of DEP's expert to be more persuasive than the testimony of Philadelphia's subsequently produced witnesses. That finding is supported by substantial credible evidence in the record, and we adopt it. Rova Farms Resort v. Investors Ins. Co., supra, 65 N.J. at 483-84. Before us, Philadlephia has moved to supplement the record with the

deposition testimony of the Environmental Program Administrator of the Gloucester Planning Department and with affidavits from other persons. the deposition of the administrator is incomplete - as of the date of oral argument, he had not been cross-examined - and we must decide the present matter on the record as established before the trial court. Consequently, we deny Philadelphia's motion to expand the record.

The judgment of the Appellate division is affirmed.

Chief Justice Wilentz and Justices Clifford, Handler, O'Hern, Garibaldi and Stein join in this opinion.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1440-84T5

GLASSBORO, et al,
Plaintiffs,
v.

GLOUCESTER COUNTY BOARD OF
CHOSEN FREEHOLDERS, NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL
PROTECTION, KINSLEY LANDFILL, INC.,
THE CITY OF PHILADELPHIA and
THE COUNTY OF CAMDEN,
Defendants,

and

TOWNSHIP OF DEPTFORD,
Defendant-Intervenor.

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Argued: December 17, 1984 - Decided:
February 15, 1985.

Before Judges King, Deighan and Bilder.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County.

Tyler Wren of the Pennsylvania Bar, admitted pro hac vice, argued the cause for appellant City of Philadelphia (Tomar, Parks, Seliger, Simonoff & Adourian, attorneys; Steven Kudatsky, of counsel and on the brief).

Joseph F. Lisa argued the cause for

respondents Borough of Glassboro, Borough of Glassboro Board of Health, Borough of Clayton and Township of Monroe.

Paul H. Schneider, Deputy Attorney General, argued the cause for respondents New Jersey Department of Environmental Protection and Commissioner Robert E. Hughey (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; Michael R. Cole, First Assistant Attorney General, of counsel).

Bruce C. Hasbrouck argued the cause for respondent County of Gloucester.

Timothy S. Haley argued the cause for respondent Deptford Township (Gordon and Gordon, attorneys).

Edward J. Egan argued the cause for respondent Kinsley Landfill.

Richard Hluchan argued the cause for respondent Hancock Waste (Sterns, Herbert & Weinroth, attorneys).

The opinion of the court was delivered by

KING, P.J.A.D.

In this case we must decide if a judicial order, based on emergency sanitation concerns, which bars any person or entity located outside the Southern New Jersey tricounty area of Salem, Gloucester

and Camden Counties from using a privately-owned, state-regulated landfill (Kinsley) violates the Commerce Clause of the federal constitution. U.S. Const. Art. I, §8, c. 3[1].

We previously denied leave to appeal this interlocutory order of Judge DeSimone of the Law Division and also denied a stay of his November 13, 1984 order. Our Supreme Court and the United States Supreme Court have also denied stays of this order. However, on December 7, 1984 our Supreme Court granted the City of Philadelphia's motion for leave to appeal, on the merits, remanded the matter to us for disposition of the appeal on the merits, and ordered

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[1] "The Congress shall have power ... to regulate Commerce... among the several states."

that the appeal be accelerated. Glassboro v.Gloucester Cty. Bd. of Chosen Freeholders, 98 N.J. 186 (1984). Upon receipt of the remand order, dated December 17, 1984, we immediately scheduled and heard oral argument on December 17, 1984. Unfortunately, we did not receive the transcript of the proceedings before Judge DeSimone until February 7, 1985. Thus any more expeditious decision of this appeal was frustrated.

The order for preliminary injunction under appeal, executed by Judge DeSimone on November 13, 1984, provided in substance that

1. The Counties of Salem, Gloucester and Camden must proceed immediately to designate sites and create landfills within their respective borders which must be operational by November 1985.

2. The Kinsley Landfill in Deptford Township, Gloucester County must cease accepting solid waste generated within the City of Philadelphia, any other Pennsylvania communities and "other out-of-district [Gloucester County] solid waste not subject to interdistrict agreements." This provision effectively excluded all solid waste originating outside of Salem, Gloucester and Camden Counties, whether from New Jersey, Pennsylvania or elsewhere.

3. All municipalities within the three counties in New Jersey were ordered to maximize recycling efforts.

4. The Kinsley Landfill was ordered closed when the capacity of an emergency 16-foot vertical expansion allowed by the court was reached. This was anticipated in November 1985.

5. Kinsley Landfill was to be closed for all sludge disposal on March 15, 1985.

Several subsequent applications by Philadelphia for modification of this order were denied. This order implemented DEP's recommendation of early November.

At the outset we note that we are satisfied that the factual underpinnings of Judge DeSimone's conclusions are well-supported by the testimony in the record and that his findings are consistent with the weight of the evidence. See R. 4:52-1 (c); Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 483-484 (1974); State v. Johnson, 42 N.J. 146, 161-162 (1964). We are required by our scope of review to accept his factual findings and the reasonable inferences he drew from them.

This is the way the matter developed. On October 11, 1984 defendant Kinsley

Landfill, Inc., a state-regulated (N.J.S.A. 48: 2-13) but privately-owned sanitary landfill in Gloucester County, notified its customers that it would reach the capacity permitted by its permit issued by the defendant, Department of Environmental Protection (DEP), and would close on October 28, 1984. On October 18, 1984 the plaintiff, Borough of Glassboro, filed a verified complaint in lieu of prerogative writ and an order to show cause naming as defendants the Gloucester County Board of Chosen Freeholders, the DEP and its Commissioner, Kinsley Landfill, Inc., the DEP and its Commissioner, Kinsley Landfill, Inc., the City of Philadelphia, and the County of Camden. Glassboro, which was a Kinsley customer, sought both to enjoin closure of the landfill and the use of the landfill for solid waste generated in

Philadelphia, Pennsylvania and Camden County, New Jersey. Thereafter numerous parties who were customers of Kinsley intervened, including private waste haulers which served public and private entities in both New Jersey and Pennsylvania.

Judge DeSimone heard testimony on October 23, 24, 25 and 26 and rendered a decision on October 26, 1984. He found that Kinsley was quickly approaching the end of its useful life. He concluded that imminent closure would cause irreparable harm to many local municipalities dependent upon it. He also found that continued use beyond current design capacity threatened injury to the citizens of Deptford Township where the landfill is located. He concluded that a single 16-foot vertical expansion could extend, as a temporary measure, the landfill's capacity consistent

with legitimate environmental concerns. This 16-foot vertical expansion would buy enough time to permit the three counties to establish new landfill sites and thus solve their impending crisis.

On the judge's order Kinsley prepared an engineering design for the vertical expansion and a plan for orderly closure which were approved by DEP in early November. In its report DEP stressed most urgently the need for Salem, Gloucester and Camden Counties to develop new landfills. DEP reported that with extraordinary effort this could be done by November 1985. DEP observed that Kinsley would be full within three and one-half months, or the end of February 1985, if the current rate of flow continued. The additional 16-foot lift could extend the life of the landfill for the one-year period needed to develop new

landfills in the tricounty area, but only if the solid-waste flow to Kinsley was substantially reduced. In order to reduce the flow, DEP proposed that use of the landfill be limited to Gloucester County municipalities and to municipalities within the contiguous two counties, Camden and Salem, both of which had executed inter-district waste flow agreements with Gloucester County.[2] Moreover, the DEP report noted that any communities using Kinsley must be ordered to maximize recycling efforts.

We agree with Judge DeSimone that this is the very type of situation which the

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[2] Two small townships in Gloucester County, Elk and East Greenwich still have capacity at their municipally-owned landfills which they must exhaust before they can resort to Kinsley.

Legislature foresaw, intended to address, hoped to avoid when it enacted the Solid Waste Management Act, N.J.S.A. 13:1E-1 et. seq., L. 1970, c. 39, effective May 6, 1970, and recognized when it noted that the collection of solid waste was "a matter of grave concern to all citizens." Id. at §2. As the record here amply shows, this "grave concern" noted in 1970 had ripened to a potentially imminent catastrophe in the tricounty area by November 1984. Action was necessary. The only available local landfill to the tricounty area was Kinsley which would "reach its design capacity in a matter of days" from the conclusion of the hearing on October 26, that is between November 10 and 14, if nothing was done. The so-called "ten-year plan" originally conceived to permit Kinsley to operate routinely until 1988, when resource reco-

very technology became available had collapsed because of increased flow, much of it from outside of New Jersey.

The general background concerning the solid waste problem in this State over the past 15 years was outlined by Justice Handler in his decision and order denying appellant's application for a stay in this case. 98 N.J. 186. He said

> The Order that is the subject of these applications must be examined in the light of the critical Statewide concerns relating to solid waste disposal, noted as early as 1974 by this Court in Southern Ocean Landfill v. Mayor of Ocean Tp., 64 N.J. 190, 193, and again, eight years later, in A.A. Mastrangelo, Inc.v. Environmental Protection Dept., 90 N.J. 666 (1982). In particular, the order must be viewed within the framework of N.J.S.A. 13:1E-1 to 38, the Solid Waste Management Act. This Act was passed by the Legislature in recognition of the fact that the management of solid waste disposal in New Jersey had consisted largely of haphazard, random, uncoordinated activities undertaken with little, if any, regard for regional planning and coordination.

N.J.S.A. 13: 1E-2a. In order to protect the public health, safety, and welfare, the Act establishes the policy of New Jersey to provide a coordinated approach to solid waste disposal by establishing 22 solid waste management districts (consisting of 21 counties and the Hackensack Meadowlands district), each of which is charged with the responsibility of developing and implementing comprehensive solid waste management plans that meet solid waste disposal needs. N.J.S.A. 13:1E-2b(2). [Id. at 191-192].

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The Solid Waste Management Act contemplates that when solid waste is transported into a solid waste management district it must be pursuant to an interdistrict agreement. N.J.S.A. 13:1E-21b(3). According to the Department, a district cannot effectively plan for the solid waste disposal facilities that are needed to meet waste disposal needs unless it knows how much waste will be entering the district from various sources. While an out-of-state waste generator cannot be compelled to enter into such an agreement, it is entirely reasonable to authorize such generators to enter into appropriate contractual arrangements that will serve to further comprehensive planning and regulation. [Id. at 192-193].

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> Congress itself has recognized the need for the development of comprehensive state plans for solid waste disposal and implicitly this requires the planned management of waste flow. See, Resource Conservation and Recovery Act of 1976, 42 U.S.C.A. §§6901-6987. Congress has there expressed a strong policy preference for resource recovery. See 42 U.S.C.A. §6941. Resource recovery cannot be accomplished if waste streams are not directed. See Central Iowa Refuse Systems, Inc. v. Des Moines Metro. Solid Waste, 715 F. 2d 419 (8th Cir. 1983) (restraint on waste flows essential to development of comprehensive waste flow plan). The court order here recognizes local responsibilities in this area, responsibilities that clearly require integrated planning. See A.A. Mastrangelo, Inc. v. Environmental Protection Dept., 90 No. J. 666(1982) (two state agencies have concurrent responsibilities to direct the interdistrict flow of waste); In re Application of Combustion Equipment Associates, 169 N.J. Super. 305 (App. Div. 1979).
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> [Id. at 194].

See also Maltz, "How Much Regulation is Too Much - An Examination of Commerce Clause

Jurisprudence, " 50 Geo Wash. L. Rev. 47, 72-74 (1981); Note, "Garbage, The Police Power, and the Commerce Clause; City of Philadelphia v. New Jersey," 8 Cap. U. L. Rev. 613 (1979); Note, "The Commerce Clause and Interstate Waste Disposal; New Jersey's Option After the Philadelphia Decision," 11 Rut. Cam. 31 (1979).

We are convinced that Judge DeSimone's order of November 13 withstands federal constitutional scrutiny for several reasons. We think that this situation has passed beyond the dimension of the every-day, business-as-usual commerce between the several states envisioned by Philadelphia v. New Jersey, 437 U.S. 624 (1978)(New Jersey statute barring all out-of-state waste held unconstitutional). The judge here was confronted with an imminent public health and welfare crisis, probably more

compelling and dangerous than the local burdens on commerce historically tolerated, as shown by the "quarantine" cases. See Asbell v. Kansas, 209 U.S. 251 (1908); Reid v. Colorado, 187 U.S. 137 (1902); Baldwin v. G.A.F. Sellig, Inc., 294 U.S. 511, 525 (1934); Bowman v. Chicago & Northwestern R. Co., 125 U.S. 466, 491 (1888). The judge here was not concerned with "the clamors of an impatient avidity for immediate and immoderate gain" against which James Madison as Publius inveighed in 1788. The Federalist No. 42. He was concerned with imminent considerations of public health and safety in the tricounty area of about 700,000, not with economic protection of local industry.

Coincidentally, we find it interesting that the "tipping fee" at Kinsley has more than tripled since the entry of Judge DeSimone's

order in November 1984. On January 7, 1985, the Board of Public Utility increased the tariff from $2.85 to $10 per-cubic-yard in order to accomodate the long-range costs of an environmentally sound closure. N.J. Evid. R. 9(2)(a). These closure costs, $7.47 per cubic yard, which ideally should have been accumulated throughout the life of the landfill through charges on both local and interstate users, must now be paid by local users. N.J.S.A. 13:1E-100, -116.

Philadelphia and other Pennsylvania communities had generated about 60% of the trash-flow to Kinsley. But only about 50% of all of Philadelphia's solid waste was sent to Kinsley. The City of Philadelphia has had no landfill within its borders since 1978. The record clearly shows that Philadelphia had the equipment and logisti-

cal capacity to route its solid waste elsewhere than Kinsley but that the 59 much smaller governmental entities in the New Jersey tricounty area had no feasible alternative to Kinsley because they lacked equipment and other resources to meet the imminent sanitary threat. The record demonstrates that the economic impact of the emergency order issued by Judge DeSimone was only modestly adverse to Philadelphia's Streets' Department budgeted item for this service, about 5% increase which would decrease to 2% after the first year. (Four million of a $91 million annual Streets' Department budget for the first year). Philadelphia's population is about 1.7 million. The economic effect on the 59 local municipalities dependent on Kinsley would have been enormous, assuming indeed there was any possible alternative

to the order. Glassboro's budget for solid waste disposal could escalate from $100,000 to $1,000,000 per year for a town of 14,500. Some towns, such as Clayton, Elmer and Woodstown had no alternative to their present private-hauler service if Kinsley were closed without access to an alternate local source. The private haulers would simply close down. There was credible evidence before the judge that Camden County's cost could rise from $3 million annually to greater than $12 million annually. Camden County has a population of about 500,000. We conclude that Judge DeSimone, in reality, had no choice in the matter but to act as he did to insure public safety. If our conclusion is soundly based, the constitutional arguments raised by appellants fail of necessity.

This temporary remedy, designed to prevent irreparable harm in the form of a

public-health crisis, derived from a proper balance of the equities whether conceived as the relative degree of hardship facing the local municipalities if no action were taken or the relative ability of waste generators outside of the tricounty area to cope with the judicial remedy imposed. See Crowe v. DeGioia, 90 N.J. 126, 134 (1982). This judicial order was not the blanket state-wide legislation precluding access for all time to New Jersey's solid-waste disposal sites to outsiders which was found constitutionally repugnant in Philadelphia v. New Jersey, supra. This was a carefully-crafted judicial order, balanced and molded to address only the evil of the day; not to throttle to perpetuity by economic discrimination any particular kind of commerce within or between the states.

We hold that the lost access by Philadelphia and others to the Kinsley site

for one year was not a "clearly excessive" concern for local interests in comparison to the "substantial state interest ... in easing solid waste disposal problems." Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 (1981). Even in Philadelphia v. New Jersey, 437 U.S. at 624, urged on us as controlling authority by Philadelphia, the Supreme Court observed its understanding "that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people." Moreover, but for the judge's order crafted to confront this health emergency, Kinsley would now be closed, because it would have reached its design limits; Philadelphia would have no access, nor would anyone else. We would have left only a public-health crisis in New Jersey. We do not think that the Constitution compels such fatalism.

While recently addressing interstate control of ground water, the United States Supreme Court clearly acknowledged its "reluctan[ce] to condemn as unreasonable measures taken by a State to conserve and preserve for its own citizens this vital resource in times of severe shortage." Sporhouse [sic] v. Nebraska ex rel. Douglas, 458 U.S. 941, 956 (1982). The Court also said: "A State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens - and not simply the health of its economy - is at the core of the police power. For Commerce Clause purposes, we have long recognized a difference between economic protectionism on the one hand, and health and safety regulation on the other." Ibid. In Sporhouse [sic] Justice Stevens, speaking for the

Court, was not persuaded that Nebraska's restrictive statute was "narrowly tailored to serve" a legitimate local purpose. Id. at 958. Here the record abundantly shows that Judge DeSimone's order indeed was "narrowly tailored" in duration, location and neutrality of preclusion, as the Constitution compels, to meet the emergency needs of our citizens until new waste disposal sites could be established. See also Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); Tribe, American Constitutional Law, §6-6 at 329-330 (1978). Judge DeSimone, by approving the new 16-foot vertical lift, ordered Kinsley to accept new waste beyond the previously-determined environmentally-sound and lawful disposal capacity of the landfill but only to assure local health concerns, not to enhance provincal [sic] economic interests.

As noted, a key element of this State's planning process is the requirement of interdistrict agreements to govern the flow of solid waste. N.J.S.A. 13:1E-21b(3). This enables the county to know where the waste will be coming from and in what quantity. The judge found that Philadelphia, contending until almost the end for an absolute right of access to Kinsley free from any environmental planning responsibility, never entered into any interdistrict agreement or other contract with Gloucester County. Camden and Gloucester County both entered into these agreements. He specifically found that Gloucester County officials negotiated in good faith in an attempt to obtain a waste-flow agreement or contract. Philadelphia refused to reduce its flow voluntarily to 1981 levels and adopt verifiable recycling

efforts until quite late in this scenario.[3] Indeed, the judge found that Philadelphia's flow "continued to escalate at an alarming rate unlike those [New Jersey] districts subject to interdistrict agreements." He also found the burden on interstate commerce presented by a waste-flow agreement or contract requirement to be minimal "in light of the same burden being placed on in-state districts." We recently made these observations in City of Elizabeth v. DEP, - N.J. Super. ___, ___ (App. Div. 1984) (slip opinion December 21, 1984 at p.11),

> Appellant Ocean County Landfill contends, additionally, that to the extent the regulation limits it to receiving waste generated from within Ocean County, it excludes waste from out-of-state in violation of the Commerce

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[3] In Philadelphia v. New Jersey, 437 U.S. at 626, Justice Stewart said that New Jersey may protect its environment "by slowing the flow of all waste into the State's remaining landfills."

Clause of the Federal Constitution. See City of Philadelphia v. State of New Jersey. 437 U.S.I. 617 (178). The point missed by this argument, however, is that the regulation does not preclude the importation of waste into New Jersey. It merely designates the disposal sites available to specific solid waste generating districts. The regulation was not adopted in furtherance of "protectionist" policies and it does address a matter of legitimate local concern, that is, avoiding the excessive concentration of solid waste in areas with inadequate disposal capacities.

In any event, our decision does not turn on the presence or absence of a waste-flow agreement or contract between Gloucester County and Philadelphia, but on the reality that a very finite resource can be used temporarily in a parochial way to avoid public peril, without offending the federal constitution.

The United States Supreme Court last term considered a claim that the Privileges

and Immunities Clause,[4] which has a common historical origin with the historical origin with the Commerce Clause[5], conferred the absolute right to employment on public works projects equally upon in-state and out-of-state residents, despite the claim of dire local employment conditions which the City of Camden sought to remedy by a 40% employment "set aside" for Camden residents. United Bldg. & Constr. Trades v. Mayor, 97 L.Ed. 2d 249 (1984). Writing for

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[4] U.S. Const. Art. IV, §2, c. 1.

[5] The Privileges and Immunities Clause and the Commerce Clause have a common origin in Art. IV §2 of the Articles of Confederation and share the common purpose of national unity. Note, "Solving New Jersey's Solid Waste Problem Constitutionally", 32 Rut.L. Rev.741, 749-750 n. 50 (1979); see Hicklin v. Orbeck, 437 U.S. 518, 531-532 (1978).

the Court, Justice Rehnquist concluded that the right to employment indeed was fundamental and protected by the Privileges and Immunities Clause. But the right was not absolute, overriding all legitimate local concerns. The City of Camden contended that its "set aside" ordinance was "necessary to counter-act grave economic and social ills," 79 L.Ed. 2d at 261, i.e., spiralling unemployment, a sharp decline in population, dramatic reduction in local businesses, eroded property values and a depleted tax base. Camden contended that the ordinance was "carefully tailored" to alleviate these evils. The Court remanded to permit Camden to create a record to prove its claims of "grave economic and social ills." If so justified, the "set aside" ordinance could survive constitutional attack notwithstanding its discri-

minatory employment feature in favor of local residents. Justice Rehnquist noted that the constitutional inquiry must be "conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures," 79 LEd. 2d at 261, citing Toomer v. Witsell, 334 U.S. 385 (1948). By analogy to the Camden case, we find no constitutional infirmity in the order before us for review because the local health and welfare emergency, perceived as a veritable "doomsday" and an "horrendous specter," as found by Judge DeSimone and as supported by the record, required some accomodation of local interests during the waning days of this landfill. Over the life of this landfill, since the 1950's , Philadelphia, and indeed all generators outside of the tri-

county area, had enjoyed unlimited access to Kinsley up until November 13, 1984. In that context, the judicial order bars users from outside the tricounty area for only about 3% of the temporal life of the landfill. And that one year or 3% is available only because of the emergency judicial order extending the original environmental life expectancy. We deem this minimal local burden imposed on interstate commerce for bona fide public safety, concerns a constitutionally acceptable imposition. As the cases state, at a certain point in matters involving public safety, Commerce Clause considerations must yield to the police power. Where that point lies on any given scale of values calls for delicate judgment and due consideration for the sancity of our Union and the federal system, as well as for local concerns. Our review

of this matter persuades us that Judge DeSimone's order has respected that delicate balance in this most difficult situation. A bright constitutional line may certainly blur at points but where the burden is only temporary and adversely affects both New Jersey interests beyond the tricounty area and Pennsylvania interests, we cannot say his call was wrong.

We must stress that the order of Judge DeSimone in effect forecloses use of the landfill by both in-state and out-of-state users beyond the tricounty area. The order does not bar Philadelphia's trash simply because of its Pennsylvania origin but because of its origin outside the emergently-affected tricounty, Southern New Jersey area. Waste originating from Atlantic City, Trenton, Newark or the State

of Delaware, or any other source outside of the tricounty area was banned.[6]

In conclusion, we observe that the private haulers serving Pennsylvania and other excluded sources of waste who intervened on this appeal and who presented their constitutional arguments and overall objections to Judge DeSimone's preclusive order have been accorded due process. We conclude that their counsels' full participation on this appeal satisfies any due process concerns which might be raised on the grounds

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[6] Other New Jersey sources than Camden, Salem and Gloucester Counties accounted for 6.1% of waste dumped at Kinsley. The record shows that there was New Jersey waste originating from 13 counties outside the tricounty area coming to Kinsley. This waste is now barred as a result of the neutral prohibition contained in the court's exclusionary order directed to all nonsignatories of interdistrict agreements.

that they may not have participated fully in the Law Division. We conclude that for all purposes relevant to the issues raised on this appeal, all private haulers serving customers beyond the tricounty area have interests with Philadelphia. The dispositive issue here turns on the source of waste coming from outside the tricounty area and the emergent character of the situation in that region confronting the judge. The particular identity of any private or public hauler or its waste sources outside of the tricounty area is irrelevant to our disposition. We are basically concerned with the flow of waste into Kinsley, not any particular point of origin.

Affirmed.

SUPERIOR COURT OF NEW JERSEY
GLOUCESTER COUNTY - LAW DIVISION
DOCKET NO. L-070476-84 PW

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| BOROUGH OF GLASSBORO, a municipal corporation of the State of New Jersey, et als, | |
| Plaintiffs, | STENOGRAPHIC TRANSCRIPT |
| vs. | of Decision |
| GLOUCESTER COUNTY BOARD OF CHOSEN FREEHOLDERS, THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROBERT E. HUGHEY, Commissioner of the New Jersey Department of Environmental Protection, KINSLEY LANDFILL, INC., THE CITY OF PHILADELPHIA and THE COUNTY OF CAMDEN, | |
| Defendants. | |

PLACE: Gloucester County Courthouse
Woodbury, New Jersey

DATE: November 13, 1984

B E F O R E:

HONORABLE SAMUEL G. DeSIMONE, AJSC

DOROTHY C. BOSS, CSR
Courthouse
Woodbury, New Jersey

THE COURT: Ladies and gentlemen, this is a the decision today in the Kinsley Landfill matter. Let the record reflect in regard to this matter, that again this morning I have heard excellent arguments of counsel in regard to the very complex issues, which this court must decide today. In addition thereto, over the weekend, I had an opportunity to review the reports that were submitted. I also had the opportunity to review the pleadings and this court's decision of October the 26, which again was reviewed by this court this morning after hearing arguments by counsel in regard to these issues.

Ladies and gentlemen, the doomsday of trash disposal is still upon us. This court again, and I emphasize, must intervene to protect the citizens of Deptford; the citizens of Gloucester County; and in effect,

all citizens of the State of New Jersey. This is an awesome decision that's been thrust upon this court to make -- so many legal complications and so many legal principles, so many factual situations, all awesome in regard to what I have to do today.

I stated before and I will state again, the court necessarily did not want to be in this position. It is not for the court to legislate; the court's purpose is to adjudicate. However, someone must fill this vacuum; someone must solve this dilemma. It has been thrust upon this court and this court aims to do it.

One of counsel likened the situation today to a baseball contest. Ladies and gentlemen, it is football season. The way I feel today if I could amplify a little, I am on the one-yard line with my goal behind

me; it's fourth down and I can't punt and I don't intend to. I intend to present to you and to the citizens of New Jersey and all people who are involved in this situation today a game plan, which I think is equitable, just, moral and equitable in regard to the solution that I propose.

This matter, ladies and gentlemen, is the Borough of Glassboro, et als vs. the Gloucester County Board of Chosen Freeholders, et als; and this action was brought on by way of an order to show cause respecting certain temporary restraints on an action in lieu of prerogative writ. The case was brought on for preliminary hearing as to the issuance of temporary restraints. And on October 26, after several days of testimony by witnesses for the various parties, this court issued a temporary restraining order against the defendant

Freeholders of Gloucester County, the New Jersey Department of Environmental Protection and its Commissioner and the Kinsley Landfill, restraining the parties from taking any action which would close the Kinsley Landfill. Furthermore, the court ordered the aforementioned defendants to provide the court with a modification to the Gloucester County Solid Waste Management Plan; a timetable for the order of the closure of Kinsley and an engineering report of a temporary vertical expansion for the landfill. I am pleased, and as I stated earlier in my opinion, and I will reemphasize for the record now, that all parties have complied with this order. The parties supplied the court with the documents and reports on November the 9 thereby affording me the opportunity of examining and reviewing same. Now ladies

and gentlemen, having had this opportunity, I am prepared to issue a ruling as to the future of this action. I am also prepared to render a decision, which I had previously reserved as to the temporary restraints requested against the City of Philadelphia.

On November the 5th, 1984, the Division of Waste Management received the proposed engineering design of a one lift expansion to the Kinsley Landfill. The report of the DEP or Department of Environmental Protection at its timetable for orderly closure states, that the lift on a whole is acceptable subject to the resolution of certain deficiencies. This lift will extend the life of the landfill for a period of approximately three and a half months at the present disposal rate. If the City of Philadelphia waste is not

accepted by the landfill, the extended period, that is, life expectancy, would be approximately one year.

The timetable for the orderly closure of Kinsley has incorporated this lift. The court is, therefore, satisfied that this lift is a reasonably, safe, temporary solution to this emergent situation. However, since the Division of Waste Management has noted certain deficiencies in its report, this court will retain jurisdiction as to insure the quick resolution of the same. Thus, accordingly, to the timetable submitted, the following shall take place and this court will amplify this order in detail following the five points that I mentioned:

1. The counties of Camden, Gloucester and Salem shall proceed immediately with implementation of one or more landfills

within their borders, with such landfills to become operational within 12 months in accordance with Exhibits B and C attached hereto and an order of this court. Let the record again state that this court personally rendered a decision in the matter of Alloway Township vs. Salem County Freeholders in the latter part of this summer in a multi-page written opinion concering the siting of Salem.

2. Within two weeks Kinsley Landfill shall cease accepting all solid waste generated within the City of Philadelphia and other Pennsylvaia communities and other out-of-district solid waste not subject to inter-district agreements.

3. Within two weeks all municipalities using Kinsley Landfill and all municipalities of Gloucester, Camden, and Salem Counties, shall maximize their recycling

efforts including curb side pickup, mandatory ordinances, stepped up public awareness compaigns and increased enforcement efforts; and shall report to this court and to the DEP on the same.

4. Other wastes presently disposed of at the Kinsley Landfill will be disposed of at the vertical expansion, no virgin ground, vertical expansion to the Kinsley Landfill until it reaches capacity, at which time said wastes are redirected to the new landfills to be implemented in the counties of Camden, Gloucester and Salem.

Lastly, five, disposal of sewage sludge at Kinsley Landfill shall cease on March 15, 1985.

The timetable is based, ladies and gentlemen, upon certain conclusions reached by the Department of Environmental Protection in its report to the court.

One, that at present there are, in fact, no alternative sites in the State of New Jersey to which it would be feasible to redirect the waste flows presently disposed of at Kinsley.

Two, based upon the first conclusion, immediate siting of new landfills is of utmost necessity.

Three, due to this situation, the redirection of Philadelphia waste was not possible.

Four, waste flow reduction is necessary in order to maximize the expanded life of Kinsley, which can be accomplished in part by recycling the plans implemented by each municipality using Kinsley.

Five, with respect to sewage sludge, such sludge by virtue of statutory and regulations already required to cease landfill disposal by March 15, 1985.

The court wants to be clear in my decision so that everyone will understand that this court adopts the one-year plan of DEP for siting and implementation. I do so for the orderly closure of Kinsley and I do so to solve this immediate dilemma, which is upon us today.

The DEP plan does insure the orderly closure of Kinsley and has attached to its report proposed administrative consent orders, which expedite the statutory process for the siting and implementation of landfills for Gloucester, Salem and Camden Counties. An intrical [sic] part of this plan is that the extended life period of Kinsley last for a period of approximately one year; thus, requiring this court to enjoin the disposal of waste by the City of Philadelphia at the Kinsley Landfill.

The plaintiffs in this action also seek

temporary injunctions restraining disposal by the City at Kinsley and restraining disposal by Camden County until those districts enter into reasonable inter-district waste flow agreements with Gloucester County in accordance with the goals, purposes and parameters of the Gloucester County Solid Waste Management Plan. This court notes that such an inter-district agreement was negotiated with Camden County signed by representatives of Gloucester County and thereafter during the course of preliminary hearings on this matter signed by the representatives of Camden County. The brief for the plaintiff, Borough of Glassboro stress that such agreements are intrical [sic.] to the solid waste, management of a coordinated statewide system as provided by New Jersey Statutes Annotated 13:1E and other portions

of that statutory authority. According to P-2 in evidence, page six, the DEP has required such agreements with the County of Camden and the City of Philadelphia since 1980 as a condition to the continued use of the Kinsley Landfill. These deficiencies of the Gloucester County Plan have been noted by the Department of Environmental Protection and its Commissioner several times over the course of four years.

Plaintiff argues that the required waste flow agreements apply even-handedly to in-state districts utilizing landfill sites in New Jersey as well as out-of-state districts utilizing the same.

Therefore, such requirements do not fall within the proscription enunciated in the case of City of Philadelphia vs. New Jersey, 437 United States Reports, 617, [sic] a 1978 U.S. Supreme Court case. In

that case the United States Supreme Court declared a New Jersey Statute, which banned most of out-of-state waste as violation of commerce clause of U.S. Constitution, United States Constitution. Accordingly, to Justice Stewart, writing the opinion for the majority and the opinions of the court through the years have reflected an alertness to the evils of economic isolation and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a state legislates to safeguard the health and safety of its people. And this was found at page 623 of that opinion.

The opinion construed in its analysis to distinquish the test to be applied when a statutory authority was discriminatory on its face and the test applicable when a statutory authority regulates even-handedly

to effectuate a legitimate public interest imposing an incidental burden on interstate commerce. The latter test is, and I quote, "The statute will be upheld unless the burden imposed on such commerce is clearly excessive in relationship to the punitive [sic.] local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." This was found at page 624 and I will note, that the court in the City of Philadelphia case, that is, the United States Supreme Court did cite Pike vs. Bruce Church, Incorporated, 397 United States Reports, 137.

Ladies and gentlemen, in the case at bar, the requirement of inter-district

waste flow agreements to insure the integrity of the county or district plan as part of a coordinated statewide management of waste facilities was a requirement imposed on in-state districts as well as out-of-state districts. The burden on interstate commerce was minimal in light of the same burden being placed on in-state districts. Counsel for the City vigorously maintains first, that such regulation requiring inter-district agreements and the City's failure to enter into one is of new [sic.] legal consequence due to the fact that nowhere is it stated that non-compliance with such regulations will result in a ban of that party's waste disposal. Secondly, counsel again vigorously argues that even if the agreements are required and are of some legal consequence, the City of Philadelphia

attempted to negotiate such an agreement in good faith; that the demand of the Gloucester County Freeholders during negotiations were unreasonable and in violation of the commerce clause. Yet, ladies and gentlemen, in C-5 admitted into evidence in these hearings at the preliminary hearing, which is a copy of correspondence between the parties it is stated unequivocally by a representative of the City in regards to that negotiation, "Gloucester County is being very cooperative." Since the court is of the opinion to back the Department of Environmental Protection and in its request for a closure of the Kinsley Landfill to support or even order the City to negotiate an inter-district waste flow agreements at this time would be to require a futal [sic.] act.

This court, ladies and gentlemen,

however cannot permit the unrestrained disposal of waste by this party, that is, Philadelphia under the present circumstances as were noted in the court's opinion of October 26. The court has heard testimony that the disposal of waste by the City of Philadelphia has continued to escalate at an alarming rate. Unlike those districts subject to inter-district agreements, by virtue of the testimony given before this court, I do not find the existence of bad faith on the pa[illegible] of the Gloucester County Board of Freeholders. Furthermore, in addition thereto, this court is balancing the equities involved, which I have done throughout this very complex litigation, in giving due consideration to the parties and the effect of an imminent closure of Kinsley, notes that the City of Philadelphia is the only party in this action which by

way of testimony of a Mr. Michaels, who, I believe, was the Streets Commissioner of Philadelphia and who I found to be a most credible gentlemen, but the Commissioner of Streets and Roads had informed this court from this very stand on October 26 that it can accommodate an imminent closure at Kinsley. It is for these reasons that I order the City of Philadelphia to stop the disposal of its waste at the Kinsley Landfill. I do so in accordance with the recommendation of the Department of Environmental Protection, ten days from today. I calculate it to be November the 27, 1984 at 4:00 p.m. Thus, the court adopts the DEP Plan in its entirety.

Ladies and gentlemen, a few weeks ago on October the 26, I alluded to this problem as a ship on alien seas, which was pilotless. The DEP has stepped into that

pilot's cabin and has given this court a plan; a plan that excludes and gives us equity, morality and justice; a timetable for the closure of Kinsley and yet, in a situation wherein the citizens of New Jersey are protected.

The court recognizes that the Gloucester County Freeholders have authorized in their negotiations with a professional service contract with Speitel Associates. The scope of the services to include the siting and implementation of a disposal site. This is in compliance with the suggested DEP report, which was present to this court and all counsel. The court will retain jurisdiction over this procedure. I do so, so that everyone in this room and the record is clear, that this court feels jusitifed and feels that it is within the inherent jurisdiction of a court in New

Jersey with its inherent equitable powers to place a protective cloak around this entire situation to solve this dilemma, to avoid this doomsday that is upon us tomorrow. Someone had to fill the void. This court aims to do so in an effort to do what is right, moral and just and to do what's right for the health, welfare and citizens of the State of Jersey.

This protective cloak will expedite the resolution of any problems which may arise in connection with the siting of alternative landfills and implementation of the DEP for an orderly closure of Kinsley. Therefore, this court orders additionally, and I do so to carry out the philosophy as I have stated on the record, to carry out the very fine suggestion of the Department of Environmental Protection, that the Gloucester County Board of Freeholders of

Gloucester, Salem and Camden Counties report one week prior to January the 1st, 1985 on the status of sites for alternate landfills. Now the Salem matter is currently on appeal. However, I do desire a report from the attorneys for Salem in regard to the status of that particular litigation.

Plaintiff, that is, the plaintiff municipalities that are a part of these legal proceedings, and there are many and I am not going to enumerate them; however, I am going one step further because what we are doing here ladies and gentlemen requires a team effort and everyone must comply with the court's directiveness. We are all in it to avoid this doomsday. I am going to order, and I believe I have inherent authority to do so, I do so again for the health, welfare and morals and for the good

of the citizens of the State of New Jersey. I order all plaintiff municipalities and all Gloucester, Camden and Salem municipalities to implement recycling efforts as are outlined in the DEP report and to inform this court of the status of such efforts two weeks from today.

I order, and I will state it again and for the reasons that I have stated on this record, that the City of Philadelphia cease disposal of solid waste at Kinsley by November 27, 1984 at 4:00 p.m. In addition thereto, I have closely examined the engineering reports that were submitted in regard to the vertical uplift, and I want to record to be clear, this court is talking about vertical uplift, no new virgin ground at Kinsley, vertical uplift. I order Deptford Township to approve building permits for the vertical uplift

and I personally will retain jurisdiction over any problems in regard to the issuance of that building permit.

Again, ladies and gentlemen, I want this group and the attorneys to recognize what this court is doing. It is not my intention to step into this situation and for the court to mandate certain things. You have given me this problem and I aim to solve it. And the only way I can is to closely monitor the situation. And when I say the court puts a protective cloak over this situation, it is in an effort and in the spirit and not only to protect the citizens of this county and the State of New Jersey but in the spirit to solve this dilemma that is affecting all of us; not to be arbitrary and capricious and to impose the court's will upon this municipality but in the spirit to all of us, the citizens of

Deptford and citizens of Gloucester County and citizens of New Jersey to solve this unfortunate dilemma.

In fashioning the remedy, I have given great consideration to the concerns of the residents of Deptford Township and the problems of their environment. I heard and I stated on October 26 in this very courtroom, I heard the testimony of a housewife who testified right from this stand under oath of how her eyes watered; of the stench of trash being thrown from trucks or windblown. I am sensitive to the feelings of those good citizens of that township. I understand their plight. I have compassion for them. I alluded to that testimony. I thought of it in regard to this decision that I make today. I am not discounting by the decision that I a making. I told the same group, in the

United States, which makes us the greatest country in the world, we live by rule of law and reason and in that regard, an orderly closure must take place, not a haphazard closure, an orderly closure and that is the aim of this court by this particular decision. It is not my intention to ignore the good citizens of Deptford Township. I sympathize with their plight. What we are attempting to do is to come up with an overall plan that will protect not only the citizens of Deptford, not only the citizens of Gloucester County but also the citizens of the State of New Jersey.

Now in that regard ladies and gentlemen, because of the total emergent nature of this particular matter that's before me and all of the things that I have ordered, I am going to relax the court rule and on these injunctive orders and orders that I

have made today, because of the necessity of acting fast and, ladies and gentlemen, you are aware that this court has handled this matter on an emergent basis, clearing my calender in order to do so and give this case top priority. I again will relax the rules and allow instead of a two-day notice, you can come back in on one-day notice, that is, 24 hours you can come back before this court for relief or modification.

In addition thereto, ladies and gentlemen, again I thank you for your courtesies, your excellent arguments, which were presented. Again I want to state for the record and for all participants in this proceeding that this court has attempted to employ every equitable situation of my experience in trying to solve this very difficult problem. I have balanced the equities. I have not treated this case

lightly. I balanced the equities in that I visualize the horrendous spector of tomorrow trash piling up in the vicinity of this courthouse. I have considered skyrocketing municipal costs, which, of course, goes -- and I have said this many times and I will say it again, because we are talking frankly today, because this is a problem that affects all of us. The poor taxpayer, he takes it on the chin when he gets the tax bill, skyrocketing municipal costs in placing this trash elsewhere. I've considered the poor citizens of Deptford Township, who have lived with this ordeal as the testimony and the record reveals to this court. And lastly -- before that, I've considered Philadelphia's plight and have not treated that lightly. But I felt for the reasons that I stated that I must do what I had to do today in

regard to this horrendous problem. And lastly, I've considered the vast specter, the vast plan of trash disposal not only in Gloucester County. I've considered my decision on how it affects Salem County, Camden County, all the municipalities and most important all of the citizens of the State of New Jersey. I have, in effect, issued these orders bearing in mind the balancing of these equities and I find and determine for the reasons that I have given on the record today that the orderly closure of Kinsley can be best accomplished as I have outlined it and as has been recommended by the DEP, that all the citizens of the State of New Jersey, Gloucester, Camden and Salem County and, of course, Deptford Township will benefit by this decision and I have employed what I feel are equitable and just principles in an effort to avoid

doomsday trash disposal, which is upon us today. For all of the reasons that I have stated in this opinion, I am going to issue the orders that I have issued today. Mr. Lisa, I am going to ask you to present an order to the court as to form only with consent of all counsel or under the five-day rule or in the event that you desire to formulate an order today with all counsel here, please feel free to do so. I will be in my other courtroom starting another trial in the matter of Department of Transportation, State of New Jersey vs. Jarco. You could find me up there.

Ladies and gentlemen, thank you for your courtesies. This hearing is ended for today.

MR. KUDATSKY: Will the court entertain an application for a stay pending appeal at this time, because I am prepared to present witnesses --

THE COURT: Just one moment, folks. I have an important application here, one moment please. Just be a little quiet. You can either stay or if you want to leave, go ahead and leave. I have got to hear what counsel has to say. Everyone sit down if your are going to stay.

Mr. Kudatsky, go ahead.

MR. KUDATSKY: Your Honor, on behalf of the City of Philadelphia, I will represent we will be immediately filing a motion for leave to appeal from Your Honor's ruling of today and I, therefore, must, under the rules, request from the trial court a stay of your ruling pending appeal. I am prepared to present witnesses right now as to the impossibility of the City of Philadelphia complying with a shutdown or, I am sorry, a bar date of November 27, 1984. I would also request that the court,

whether at this moment or as immediately as possible, set this case down for a case management conference or at least expedited trial on the merits and also authorize me to engage an expedited discovery. As I understand Your Honor's ruling, it is a preliminary injunction pending final adjudication in this case, which will occur at some, as yet, unspecified time and I am, therefore, moving to have the trial on the merits be scheduled promptly with due regard to the court's emergent calendar as I know it is. But certainly on this stay application I'd like to proceed with that today.

THE COURT: Any arguments on the stay?

MR. LISA: Of course, I oppose the stay for two reasons. To grant the stay would totally vitiate the order for which the stay is requested and makes it meaningless.

Secondly, the effect of the ruling against the City of Philadelphia does not take effect by the court's order to for two weeks, which gives them plenty of time to address this to the Appellate Division.

THE COURT: Mr. Haley.

MR. HALEY: I would just second exactly what Mr. Lisa said.

MR. HASBROUCK: I would join in that.

THE COURT: Ladies and gentlemen again, what Mr. Kudatsky has proposed to this court, that I stay my decision until he can seek appellate process, which certainly is his right. In that regard, that particular application, ladies and gentlemen, so you will understand, it is addressed to the sound discretion of the trial court. I being the trial court exercise my discretion. Mr. Kudatsky, I deny your motion for a stay. My order will go into effect

immediately. The reason I do so is as counsel has pointed out on the record. The injuntion does not take effect against the City of Philadelphia until November the 27, at 4:00 p.m. That is the cutoff date. In the meantime you, of course, have the right to seek Appellate Process. I exercise my discretion. Your application for a stay is denied by this court.

MR. KUDATSKY: Just so I understand, you are not reserving ruling on the stay until the 27. You are denying it?

THE COURT: I am denying it today. I want my order to go into effect for the reasons I stated on the record.

MR. KUDATSKY: I want to be sure so I can represent it to the Appellate Division.

THE COURT: I will say it again, it is denied. I have exercised my discretion, no stay from this court. You may seek it from the Appellate Division.

Now in regard to case management Mr. Kudatsky, as you realize this court wears two hats. I am also Assignment Judge for Gloucester, Cumberland and Salem Counties and also Civil Assignment Judge for all three of those counties. What I would suggest is that you send me a letter requesting case management with copies to all counsel and I will attempt to fit it in my very busy schedule.

MR. EPSTEIN: Am I to interpret from the order when reduced to writing and signed, it would contain a restraint against the County of Gloucester to restrain them from terminating our existing agreemnt?

THE COURT: Mr. Epstein, the court is adopting the DEP Plan, okay. That's all I will say in regard to that particular matter. If you have any problems on that,

you can come in on a one-day notice. I would suggest that you see counsel or Gloucester as well as Camden.

MR. EPSTEIN: Thank you.

THE COURT: Anything else?

Thanks a lot.

(Whereupon, the hearing was concluded.)

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SUPERIOR COURT OF
NEW JERSEY
LAW DIVISION
GLOUCESTER COUNTY
DOCKET NO.
L-070476-84 PW

BOROUGH OF GLASSBORO,
a municipal corporation
of the State of New
Jersey

Plaintiff

v.

GLOUCESTER COUNTY BOARD
OF CHOSEN FREEHOLDERS,
et al

Defendant

CIVIL ACTION

ORDER FOR PRELIMINARY INJUNCTION

This matter having been opened to the Court by Joseph F. Lisa, Esq., attorney for Plaintiff Borough of Glassboro, and in the presence of counsel for the various parties to this case and this matter having been heard by the Honorable Samuel G. DeSimone on October 19, 23, 24, 25, 26 and November 13, 1984 and the Court having heard the testimony of the various witnesses, having

reviewed the various exhibits, affidavits and briefs submitted by counsel and having heard the arguments of counsel, and it appearing to the Court that there is an immediate threat of irreparable injury if the temporary restraints entered by this Court on October 26, 1984 are not converted into a preliminary injunction with the modifications herein set forth, and for the reasons set forth by the Court in its oral Opinion on November 13, 1984, and for good cause shown;

It is on the 13th day of November, 1984 ORDERED

1) that defendants are restrained from taking any action which would prevent the continued uninterrupted use of Kinsley Landfill in accordance with the terms of this order.

2) The Counties of Camden, Gloucester and Salem shall proceed immediately with

implementation of one or more landfills within their borders, with such landfills to become operational within 12 months of the date hereof in accordance with Exhibits B and C attached hereto with respect to Camden and Gloucester Counties, and with respect to Salem County, in accordance with a schedule to be filed with the Court.

3) Not later than November 27, 1984 at 4:00 P.M., Kinsley Landfill shall cease accepting all solid waste generated within the City of Philadelphia and other Pennsylvania communities, and shall cease accepting other out of district solid waste not subject to interdistrict agreements.

4) Not later than November 27, 1984, all municipalities within the borders of Camden, Gloucester and Salem using the Kinsley Landfill shall maximize their recycling efforts, including curbside

pickup, mandatory ordinances, stepped up public awareness campaigns, and increased enforcement efforts, and shall report to the Court and the DEP within such time.

5) Except as provided in paragraph number 3 above, all wastes presently disposed of at the Kinsley Landfill will be disposed of at the vertical expansion to the Kinsley Landfill until it reaches capacity, at which time said wastes are redirected to the new landfills to be implemented in the Counties of Camden, Gloucester and Salem.

6) Disposal of sewage sludge at Kinsley Landfill shall cease on March 15, 1985.

7) Kinsley landfill may implement a vertical expansion for one additional lift of compacted solid waste to be conducted in accordance with the engineering design sub-

mitted by Kinsley and in accordance with the report submitted to the Court by DEP.

8) The Counties of Salem, Gloucester and Camden shall report to the Court not later than December 24, 1984 on the status of site selection for county landfills.

9) The Township of Deptford shall issue the building permits necessary for the vertical expansion of Kinsley landfill.

10) Any provision of this Order may be modified or dissolved by application of any party on one-day notice to all other parties.

11) This Court retains jurisdiction.

12) The motion of the City of Philadelphia to stay this order pending appeal is denied.

/s/ Samuel G. De Simone
SAMUEL G. DE SIMONE, A.J.S.C.

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SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION
GLOUCESTER
COUNTY

Plaintiff, BOROUGH OF GLASSBORO, a municipal corporation of the State of New Jersey,

Docket No. L-070476-84
PW

vs.

Defendants, GLOUCESTER COUNTY BOARD OF CHOSEN FREEHOLDERS, et als.

CIVIL ACTION

ORDER CLARIFYING
PRIOR ORDER DATED
NOVEMBER 13, 1984.

This matter having been brought before the Court by Thomas S. Higgins, Esquire, of the law firm of Higgins & Slachetka, PA, attorneys for The Camden County Municipal Utilities Authority, for an order modifying and clarifying a prior order entered by this Court on November 13, 1984 in the above-captioned case;

And notice of said case having been communicated telephonically upon the parties and in the manner set forth in the Affidavit of Service herein;

And the Court having considered the affidavit of Richard K. Perna, P.E. dated November 28, 1984;

And the Court further having considered all of the pleadings and testimony in the above-captioned case;

And the Court having reviewed its prior order of November 13, 1984;

And the Court being satisfied that good cause has been shown to modify and clarify said order;

IT IS THEREUPON this 29th day of November, 1984, ordered that the prior order of this Court dated November 13, 1984 is clarified to permit the Camden County Municipal Utilities Authority Rockaway

Valley Regional S.A., Borough of Collingswood, Clementon S.A. Straford S.A. to continue to deposit sewage sludge and grit removed from its wastewater treatment facilities at Kinsley Landfill effective immediately and until further order of this Court. All other provisions of the order of November 13, 1984, except as modified by the Superior Court of New Jersey, Appellate Division, or the Supreme Court of the State of New Jersey, or this Court are continued.

/s/ Samuel G. De Simone
SAMUEL G. DE SIMONE, A.J.S.C.

SUPERIOR COURT OF
NEW JERSEY
LAW DIVISION
GLOUCESTER COUNTY
DOCKET NO.
L-070476-84 PW

BOROUGH OF GLASSBORO,
a municipal corporation
of the State of New
Jersey

CIVIL ACTION

Plaintiff

TEMPORARY
RETRAINING [SIC] ORDER

v.

GLOUCESTER COUNTY BOARD
OF CHOSEN FREEHOLDERS,
et al

This matter having been opened to the Court by Joseph F. Lisa, Esq., attorney for Plaintiff Borough of Glassboro, and in the presence of counsel for the various parties to this cause as indicated on the list and annexed hereto, and this matter having been heard by the Honorable Samuel G. Desimone on October 19, 23, 24, 25, 26, 1984 and the Court having heard the testimony of the various witnesses, having reviewed the

various exhibits, affidavits and briefs submitted by counsel and having heard the arguments of counsel, and it appearing to the Court that there is an immediate threat of irreparable injury if the temporary restraints are not granted, and for the reasons set forth by the Court in its oral Opinion on October 26, 1984, and for good cause shown;

It is on this 26th day of October, 1984, ORDERED that defendants are restrained from taking any action which would prevent the continued uninterrupted use of Kinsley Landfill until and including November 13, 1984;

And it is further ORDERED that not later than November 9, 1984, the County of Gloucester shall formulate a reasonable alternate site for solid waste disposal and to modify its Solid Waste Management Plan

accordingly, and take all steps necessary to effectuate same, and shall submit a written report to the Court by 4:00 P.M. on November 9, 1984;

And it is further ORDERED that not later than November 9, 1984, the DEP shall submit a timetable for the orderly closure of the Kinsley Landfill and take steps to redirect waste flow in an orderly fashion and submit a report to the court by 4:00 P.M. on November 9, 1984;

And it is further ORDERED that not later than November 5, 1984, Defendant Kinsley Landfill, Inc. shall submit to Walter Burshtin of the DEP and to the Court, a complete engineering design for the vertical expansion of the Kinsley Landfill for one additional lift of compacted solid waste;

And it is further ORDERED that not later than November 9, 1984, the DEP shall

review the Engineering design and submit a written report to the Court by 4:00 P.M. on that date;

And it is further ORDERED that all reports and submissions required by this Order shall be made available to all counsel on November 9, 1984 by 4:00 P.M. at the Gloucester County Court House;

And it is further ORDERED that the Court shall reserve decision on the application for restraints against the County of Camden and the City of Philadelphia;

And it is further ORDERED that all counsel shall appear before the Court on November 13, 1984 at 9:00 A.M. for argument regarding the continuation, dissolution or modification of this ORDER and the restraints contained therein;

And it is further ORDERED that any provision of this Order may be modified or

dissolved by application of any party on one-day notice to all other parties.

/s/ Samuel G. De Simone
SAMUEL G. DE SIMONE, A.J.S.C.

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ATTORNEY FOR Plaintiff

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| BOROUGH OF GLASSBORO, A Municipal Corporation of the State of New Jersey, | : | SUPERIOR COURT OF NEW JERSEY LAW DIVISION GLOUCESTER COUNTY DOCKET NO. |
| Plaintiff, | | |
| -vs- | : | Civil Action |
| GLOUCESTER COUNTY BOARD OF CHOSEN FREEHOLDERS, THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROBERT E. HUGHEY, Commissioner of the New Jersey Department of Environmental Protection, KINSLEY LANDFILL, INC., THE CITY OF PHILADELPHIA and THE COUNTY OF CAMDEN, | : | VERIFIED COMPLAINT IN LIEU OF PREROGATIVE WRIT |
| Defendants. | | |

The Borough of Glassboro, A Municipal Corporation of the State of New Jersey with principal offices located at Main and High Streets, in the Borough of Glassboro, County of Gloucester and State of New Jersey by way of Complaint says:

FIRST COUNT

1. The Gloucester County Board of Chosen Freeholders (hereinafter referred to

as "County") has adopted a solid waste mangement plan, which has been most recently updated as of February 9, 1983.

2. Pursuant to the authority contained in the Solid Waste Management Act, defendants, Robert E. Hughey, Commissioner of the New Jersey Department of Environmental Protection and the New Jersey Department of Environmental Protection (hereinafter jointly referred to as "DEP") by certification dated July 28, 1983, did approve the said County Solid Waste Management plan, subject to certain modifications and noting various significant deficiencies in said plan.

3. Defendant, Kinsley Landfill, Inc. (hereinafter referred to as "Kinsley") maintains and operates a solid waste disposal facility in the Township of Deptford, Gloucester County, New Jersey. Said faci-

lity has been in continuous operation since in or about 1958. Pursuant to the current Gloucester County Solid Waste Management Plan, as updated by the County and approved by the DEP, all solid waste generated in the Borough of Glassboro must be disposed of at Kinsley.

4. The current update of said Gloucester County Solid Waste Management Plan provides, inter alia, that Kinsley shall remain open until 1988.

5. A key element of said Gloucester County Solid Waste Management Plan provides that the County will proceed with the implementation of a County resource recovery facility to be on line by 1987, prior to the closing of Kinsley in 1988. Said resource recovery facility would then be available to the Borough for disposal of its solid waste, prior to the closing of

Kinsley, and therefore without interruption of an available site for such disposal.

6. Based upon information and belief, the portion of the Kinsley facility which is presently in operation pursuant to approval granted by the DEP is about to reach its permitted capacity, which may result in the closure of said facility in the immediate future, if expansion to other adjoining lands of Kinsley is not approved for solid waste disposal purposes by the DEP.

7. Upon information and belief, Kinsley owns substantial adjoining lands, consisting of approximately 188 acres, which is suitable for additional solid waste disposal as a continuation of the existing operation and facility.

8. Pursuant to the provisions and procedures set forth in the Solid Waste

Management Act, Kinsley has made application to the County and the DEP for approval to utilize said additional tract of land for solid waste disposal purposes.

9. The County has deemed said application to be in violation of the existing approved Gloucester County Solid Waste Management Plan, thereby requiring an amendment to said Plan by the County.

10. Although the Gloucester County Solid Waste Management Plan purports to impose a condition upon the continued utilization of the Kinsley Landfill until 1988, at Chapter 4, Section B (c), that Kinsley must operate within its permitted design capacity with no expansion, said purported condition is void and unenforceable because:

(a) Within the context of the overall plan, and by reading of the overall

Plan document, the plain and unambiguous requirement that Kinsley remain open until 1988 is a material and essential ingredient of the Plan and was clearly intended as such in the formulation of the Plan; and

(b) In the certification of said plan by the DEP, the Commission concluded that, with Kinsley operational through 1986-1987, the County had identified sufficient capacity to meet the County's disposal requirements through that time, but that the Plan was deficient for failure to designate sufficient additional suitable sites to meet the mandatory ten year planning requirement under the Solid Waste Management Act.

11. Therefore, the Gloucester County Solid Waste Management Plan, as presently updated by the County and certified by the DEP, allows for and requires expansion of

the Kinsley facility, at least to the extent necessary to render said facility available for solid waste disposal by the Borough until 1988 or until such time as the County's resource recovery facility is operational.

12. The closure of the Kinsley Landfill in the immediate future will result in immediate and irreparable harm to the Borough and its residents.

13. The Solid Waste Management Act divests municipalities of control and jurisdiction over their solid waste disposal. Said Act charges the DEP and the County with the authority, jurisdiction, and responsibility of providing a comprehensive plan for disposal of solid waste, for a duration of at least ten years, for the uninterrupted disposal of solid waste. If Kinsley Landfill is permitted to close

without the substitution of a comprehensive ten year plan providing for a reasonable and viable alternative means of disposing of solid waste, without interruption, such responsibility will not have been fulfilled by the DEP and the County.

WHEREFORE, Plaintiff Borough of Glassboro demands judgment against the County, DEP, and Kinsley as follows:

(A) Determining and declaring that the Gloucester County Solid Waste Management Plan, as presently updated by the County and certified by the DEP, allows for and requires expansion of the Kinsley Landfill, at least to the extent necessary to render said facility available for solid waste disposal by the Borough until 1988 or until such time as the County's resource recovery facility is operational.

(B) Enjoining and restraining any action by said Defendants, the County, DEP

or Kinsley, which would close Kinsley Landfill to the Borough pending the final outcome of this action.

(C) Enjoining and restraining any action on behalf of said Defendants which would prohibit the disposal of solid waste generated in the Borough until 1988, or until such time as the County's resource recovery system is operational.

SECOND COUNT

1. Paragraphs 1 through 9, and 12 and 13, of the First Count are hereby repeated and realleged as if fully set forth herein.

2. If, in the alternative to the allegations set forth in Paragraphs 10 and 11 of the First Count, it is determined that the Gloucester County Solid Waste Management Plan, as updated and certified,

does not allow and require expansion of the Kinsley Landfill at least to the extent required to permit its continued operation until 1988 or until the County's resource recovery facility is operational, then said Plan is materially deficient pursuant to the applicable terms of the Solid Waste Management Act for the following reasons:

(a) Failure to provide for a ten year plan of uninterrupted capability for disposal of solid waste generated within the County;

(b) Failure to designate sufficient additional available suitable sites to provide for disposal of solid waste, if Kinsley is not allowed to remain open;

(c) Other miscellaneous violations.

3. If said plan is determined to be materially deficient and in contravention of the applicable provisions of the Solid Waste Management Act then it should be reformed to allow expansion of Kinsley Landfill, at least to the extent required to permit its continued operation until 1988, or until the County's resource recovery facility is operational, in order to achieve the intended purpose and policy of the Plan.

WHEREFORE, in the event that the relief demanded in the First Count is not granted, Plaintiff Borough of Glassboro demands judgment, in the alternative under this Count, against Defendants County, DEP and Kinsley, as follows:

(A) Reforming the Gloucester County Solid Waste Management Plan to allow expan-

sion of Kinsley Landfill, at least to the extent required to permit its continued operation until 1988, or until the County's resource recovery facility is on line.

(B) Enjoining and restraining any action by Defendants County, DEP or Kinsley which would prevent the continued, uninterrupted disposal of solid waste generated in the Borough at Kinsley Landfill, pending the final outcome of this action.

(C) Enjoining and restraining the continued uninterrupted disposal of solid waste generated in the Borough at Kinsley Landfill until 1988, or until the County's resource recovery facility is operational.

2. If, in the alternative to the allegations set forth in Paragraphs 10 and

11 of the First Count, it is determined that the Gloucester County Solid Waste Management Plan, as updated and certified, does not allow and require expansion of the Kinsley Landfill at least to the extent required to permit its continued operation until 1988 or until the County's resource recovery facility is operational, then said Plan is materially deficient pursuant to the applicable terms of the Solid Waste Management Act for the following reasons:

(a) Failure to provide for a ten year plan of uninterrupted capability for disposal of solid waste generated within the County;

(b) Failure to designate sufficient additional available suitable sites to provide for disposal of solid waste, if Kinsley is not allowed to remain open;

(c) Other miscellaneous violations.

3. If said plan is determined to be materially deficient and in contravention of the applicable provisions of the Solid Waste Management Act then it should be reformed to allow expansion of Kinsley Landfill, at least to the extent required to permit its continued operation until 1988, or until the County's resource recovery facility is operational, in order to achieve the intended purpose and policy of the Plan.

WHEREFORE, in the event that the relief demanded in the First Count is not granted, Plaintiff Borough of Glassboro demands judgment, in the alternative under this Count, against Defendants County, DEP and Kinsley, as follows:

(A) Reforming the Gloucester County Solid Waste Management Plan to allow expansion of Kinsley Landfill, at least to the

extent required to permit its continued operation until 1988, or until the County's resource recovery facility is on line.

(B) Enjoining and restraining any action by Defendants County, DEP or Kinsley which would prevent the continued, uninterrupted disposal of solid waste generated in the Borough at Kinsley Landfill, pending the final outcome of this action.

(C) Enjoining and restraining the continued uninterrupted disposal of solid waste generated in the Borough at Kinsley Landfill until 1988, or until the County's resource recovery facility is operational. hereby repeated and realleged as if fully set forth herein.

2. The Borough is a party to a contract with Kinsley for a period of five years commencing October 1, 1981 and ending September 30, 1986, providing for disposal

of Type No. 10 solid waste generated in the Borough at Kinsley Landfill at a base rate of $2.00 per cubic yard.

3. Pursuant to said contract, the Borough has been disposing of all of its solid waste at Kinsley from the inception of said contract to the present time for the consideration of $2.00 per cubic yard plus additional tipping fees for which the Borough was obligated under said agreement, currently in the amount of $.28 per cubic yard.

4. Said contract was entered into between the Borough and Kinsley in accordance with the provisions and parameters of the Gloucester County Solid Waste Management Plan, adopted by the County and approved by the DEP.

5. The Borough has relied upon the terms of said contract and upon the provi-

sions of the Gloucester County Solid Waste Management Plan in determining its capital equipment needs for collection and disposal of solid waste, its operating expense and manpower requirements for solid waste collection and disposal purposes, its capital budget, debt service, and other long range planning requirements in connection with solid waste collection and disposal services. The Borough has also relied upon said contract and said Plan in determining the availability of resources and funds for establishing and implementing the rendering of other municipal services in the Borough of Glassboro.

6. The imposition of any substantial increase in the cost (including capital outlay, debt service and operating expenses) without sufficient lead time to allow for a major rearrangement and reallocation

of resources available to the Borough in fulfilling its obligation to provide municipal service to its residents, would result in substantial, immediate and irreparable harm to the health, safety and welfare of the Borough and its residents.

7. The Borough has received official notice from Kinsley that the Kinsley Landfill will be closed in the immediate future. (See Exhibit A) In light of the County's refusal to approve expansion (if such approval is necessary), and DEP's inaction to review and approve expansion plans, such closing is imminent.

8. If such closure of the Kinsley Landfill does occur in the immediate future, the Borough will have no reasonable and viable alternative site available to it for the disposal of solid waste generated in the Borough.

9. Upon information and belief, the County purports to be negotiating with the operator of a landfill somewhere in Pennsylvania, allegedly 75 miles distant from Gloucester County. It is questionable whether the County will be able to obtain permission for disposal of solid waste generated in the County at said landfill. If it does, upon information and belief, the dumping fees will be $10 to $12 per cubic yard initially, with escalation provisions as time goes on.

10. In order to provide for the disposal of Gloucester County solid waste at the facility mentioned in the preceding paragraph or any similarly situated facility, the County would be required to initiate a comprehensive study, data collection process, hearing process, etc., in accordance with the applicable provi-

sions of the Solid Waste Management Act, to be able to consider an amendment to the existing Gloucester County Solid Waste Management Plan to permit disposal at such a site. Such a process would require detailed evaluation and consideration of the transportation patterns, the economic impact upon the municipal governments affected, etc., before approval of such an amendment could even be considered. If adopted, such amendment would require submission to, consideration by, and approved by the DEP.

11. Therefore, even if such an amendment were feasible (which is denied), the time requirements for the evaluation, approval and certification process would, of necessity, result in a discontinuation of solid waste disposal availability to the Borough.

12. A proposal such as that described in Paragraph 9 above would be totally unfeasible and impossible to comply with by the Borough. The reasons include the following:

(a) The Borough now operates two trash trucks (25 cubic yard capacities) and one open truck for disposal of loose and bulky items. Considering the round trip travel time involved to a distant landfill, it is estimated that the Borough would be required to purchase three or four new trucks, with capacities in the range of 32 to 35 cubic yards.

(b) When the County finally completes construction of its resource recovery facility, the Borough would then be left with surplus trash trucks that it no longer needs.

(c) The Borough would have to hire substantial additional manpower to operate these additional trucks.

(d) The dumping fees alone would multiply five to six-fold above Kinsley's rates, at the outset, with escalation clauses.

(e) It is not yet determined whether the Borough possesses the legal authority to transport solid waste in interstate commerce.

(f) In snowy or icy weather, transportation of waste would have to be suspended, or would be extremely hazardous.

(g) The transportation costs, including fuel, wear and tear on the trucks, tolls, etc., would be extremely high.

(h) In addition to the capital outlay and/or debt service to be incurred for purchasing the required new capital equipment, the operating expenses for solid

waste disposal to be incurred by the Borough would, based upon preliminary estimates, escalate from its current figure of less than $100,000 per year to as much as $1,000,000 per year.

(i) Even if the Borough could meet such additional financial requirements for solid waste disposal, the results would necessitate a severe curtailment of other municipal services which are vital to the public health, safety and welfare.

13. Therefore, such an immediate substantial financial burden imposed upon the Borough would substantially impair the health, safety and welfare of the Borough and its residents, either as a result of inadequate solid waste disposal services or curtailment of other vital municipal services.

14. Such detriment to the Borough would be the result of the reliance by the

Borough upon the aforementioned contract between the Borough and Kinsley which was entered into in compliance with and in reliance upon the Gloucester County Solid Waste Management Plan which was adopted by the County and approved by the DEP.

15. As a result of such detrimental reliance, the County and DEP are estopped from depriving the Borough of the continued utilization of Kinsley Landfill for solid waste disposal services until such time as the County and DEP provide the Borough with a reasonable and viable alternative method of disposing of its solid waste.

Wherefore, Plaintiff Borough of Glassboro demands judgment against Defendants County, DEP and Kinsley as follows:

(A) Determining and declaring that said Defendants are estopped from denying

the Borough access to the Kinsley Landfill for solid waste disposal services, at the current contract rate between the Borough and Kinsley for the duration of said contract, and until such time as the County and DEP provide the Borough with a reasonable and viable alternative method of disposing of its solid waste.

(B) Enjoining and restraining said defendants from taking any action which would deprive the Borough of disposing of its solid waste at Kinsley Landfill pending the final outcome of this action.

(C) Enjoining and restraining said Defendants from taking any action which would deprive the Borough of the continued and uninterrupted use of the Kinsley Landfill, at current contract rates, until such time as the County and DEP provided the Borough with a viable and reasonable

alternative for disposal of its solid waste.

FIFTH COUNT

1. Plaintiff repeats and realleges all of the allegations of the Fourth Count as if fully set forth herein.

2. If approval by the County and/or DEP is required for the expansion of the Kinsley Landfill, the County and DEP are estopped from denying Kinsley's application for expansion, at least to the extent that such expansion is required to provide the Borough with solid waste disposal capacity until a reasonable and viable alternative means of disposal is adopted, approved and available.

WHEREFORE, Plaintiff Borough of Glassboro demands judgment against Defendants County, DEP and Kinsley as follows:

(A) Determining and declaring that said Defendants are estopped from denying any application for expansion, if required, of the present Kinsley Landfill site until at least such time as a reasonable and viable alternative is approved and operational.

(B) Enjoining and restraining such Defendants from taking any action to deny expansion which would deny the Borough of disposing of its solid waste at Kinsley Landfill pending the final outcome of this action.

(C) Enjoining and restraining Defendants from taking any action denying approval for such expansion which would deprive the Borough of continued and uninterrupted use of the Kinsley Landfill until such time as the County and DEP provide the Borough with a viable and reasonable alternative for disposal of its solid waste.

## SIXTH COUNT

1. Plaintiff repeats and realleges Paragraph 1 through 9 and Paragraphs 12 and 13 of the First Count as if fully set forth herein.

2. If it is determined that the proposed expansion of its existing facility by Kinsley was not already authorized and required by the existing County Solid Waste Management Plan, the denial of such request for expansion approval by the County was unreasonable, arbitrary and capricious for the following reasons:

(a) The County failed to make findings of facts and conclusions upon which to base its denial;

(b) The record is deficient of sufficient facts to reasonably support a denial of the application;

(c) The action by the County was contrary to the recommendation of the

Gloucester County Solid Waste Advisory Council, and without due regard to the findings, report and recommendation of said Council;

(d) The action by the County was contrary to the recommendation of nearly every municipality in the County which went on record, in writing, with the County prior to its action in favor of expansion of Kinsley. (The only municipality which went on record in opposition was the host municipality of Deptford Township which, although opposing expansion approval for the entire 188 acre site, recognized that some shorter term expansion would be appropriate and resolved, inter alia that "any expansion granted to Kinsley Landfill should be calculated so that such expansion would not exceed one (1) year, leaving the Freeholder Board the discretion to grant or

deny a further expansion at that time and each year thereafter.")

(e) The County failed to give due consideration to the severe economic impact upon the Borough and other municipalities throughout the County.

(f) The County failed to give due regard to the severe adverse impact upon the health, safety and welfare of residents of the Borough and throughout the County;

(g) The County failed to provide a reasonable and viable alternative means of disposing solid waste generated in the Borough and throughout the County in the event of the closure of Kinsley Landfill;

(h) The County has failed to correct the many deficiencies which have been cited by the DEP in the County Solid Waste Management Plan;

(i) The County has failed to implement the portions of its Plan which

have been approved in a timely and diligent manner;

(j) The action of the County was improper for other miscellaneous reasons.

WHEREFORE, if it is determined that approval for expansion by Kinsley was necessary, then the Borough of Glassboro hereby demands judgment against Defendants County, DEP and Kinsley as follows:

(A) Determining and declaring that the action of the County in denying said expansion application, at least to the extent necessary to provide continued capacity until such time as the County's resource recovery facility is operational, was unreasonable, arbitrary and capricious, void and of no effect;

(B) Ordering the County to approve the expansion application of Kinsley, at least to the extent required to provide suf-

ficient capacity until such time as the County's resource recovery facility is operational;

(C) Enjoining and restraining said defendants from depriving the Borough of continued and uninterrupted use of the Kinsley Landfill for solid waste disposal services until the final outcome of this action;

(D) Enjoining and restraining said defendants from any action which would prohibit the Borough from disposing of its solid waste at Kinsley Landfill at least until such time as the County's resource recovery facility is operational.

(E) Compelling the DEP to immediately undertake its review process, to diligently expedite said process, and to approve the expansion application of Kinsley, at least to the extent required to provide solid

waste disposal capability to the Borough until such time as the County's resource recovery facility is operational.

SEVENTH COUNT

1. Plaintiff hereby repeats and realleges Paragraphs 1 through 13 of the First Count as if fully set forth herein.

2. As a result of the adoption by the County and approval by the DEP of the Gloucester County Solid Waste Management Plan, and the operation by Kinsley pursuant to said plan, an implied contract exists between the County/DEP and Kinsley providing for the continued operation of the Kinsley landfill until 1988.

3. The Borough is a third party beneficiary of the aforementioned contract and, as such, is entitled to continue disposing of its solid waste at the Kinsley landfill until 1988.

WHEREFORE, plaintiff Borough of Glassboro demands judgment against defendants, County, DEP and Kinsley as follows:

(A) Declaring and determining that an implied contract between the County/DEP and Kinsley exists providing for approval for continued utilization of the Kinsley landfill for solid waste disposal through 1988.

(B) Declaring and determining that the Borough is a third party beneficiary of the aforementioned contract.

(C) Compelling specific performance of said contract by said defendants.

(D) Enjoining and restraining said defendants from taking any action which would deprive the Borough of the continued and uninterrupted use of Kinsley landfill for solid waste disposal services pending the final outcome of this action.

(E) Enjoining and restraining said defendants from taking any action which would prohibit the Borough from utilizing Kinsley landfill for solid waste disposal services through 1988.

EIGHTH COUNT

1. Plaintiff hereby repeats and realleges Paragraphs 1 through 9, and 12 and 13 of the First Count as if fully set forth herein.

2. Pursuant to its rule making authority, the DEP has issued flow orders which have directed solid waste flow from outside Gloucester County into the Kinsley landfill. Such orders include substantial amounts of flow from the City of Philadelphia, the County of Camden, and other areas throughout the State of New Jersey.

3. While issuing said flow orders, the DEP has not taken corresponding steps

to provide limitations or other controls upon such out-of-county flow in order to prevent the acceleration of filling up and exhausting the capacity of the Kinsley landfill at a rate greater than that anticipated when the plan was formulated, adopted and approved.

4. As a result, if it is determined that the plan does not already allow and require expansion, at least to the extent required to permit utilization until 1988 or until completion of the County resource recovery facility, the said action of the DEP in issuing said flow orders has rendered the plan unworkable.

WHEREFORE, if it is determined that expansion is not already permitted and required by the existing plan, Plaintiff Borough of Glassboro demands judgment against defendants DEP, County and Kinsley as follows:

(A) Compelling DEP to immediately review and expedite approval of Kinsley's expansion plans, at least to the extent necessary to render the plan workable, by providing sufficient capacity through 1988, in light of the flow orders which have been issued by DEP.

(B) Enjoining and restraining any of said defendants from taking any action which would prohibit the Borough from continued and uninterrupted use of Kinsley landfill for solid waste disposal services pending the final outcome of this action.

(C) Enjoining and restraining said defendants from taking any action which would prohibit the Borough's continued and uninterrupted use of Kinsley landfill for solid waste disposal services through 1988 or until such time as the County resource recovery facility is operational.

NINTH COUNT

1. Plaintiff hereby repeats and realleges all of the allegations of the Eighth Count as if fully set forth herein.

2. The certification and modifications to the plan by DEP and the flow orders issued by DEP require inter district contracts between County and other districts whose solid waste is disposed of at Kinsley, including the City of Philadelphia.

3. Such requirements have been imposed at least as early as September 26, 1980, as therein contained in the certification of approval with modification of the original Gloucester County Solid Waste Management Plan by then Commissioner Jerry Fitzgerald English.

4. Notwithstanding the existence of said requirement for more than four years,

no such interdistrict agreement has been entered into between the County and the City of Philadelphia.

5. The imposition by the DEP of such a requirement upon the City of Philadelphia applies equally to said City of Philadelphia and to other districts in the State of New Jersey, and therefore is not discriminatory against an out-of-state entity.

6. The failure to achieve said inter-district agreement substantially impairs the Plan in that it results in a lack of control over the the waste generated in the City of Philadelphia and being disposed of at Kinsley, in the same manner and to the same extent as waste from within the County is controlled pursuant to said Plan.

7. Upon information and belief, the City of Philadelphia has failed and refused

to negotiate with the County in good faith towards the consumation of such an inter-district agreement.

WHEREFORE, Plaintiff, Borough of Glassboro demands judgment against Defendants County, DEP, Kinsley and City of Philadelphia as follows:

(A) Enjoining and restraining the City of Philadelphia from disposing of solid waste in the Kinsley Landfill until at least such time as the said City of Philadelphia does negotiate in good faith and enter into a reasonable interdistrict agreement with the County concerning the use of Kinsley Landfill by the said City of Philadelphia, in accordance with the goals, purposes and parameters of the Gloucester County Solid Waste Management Plan.

(B) Enjoining and restraining Defendants DEP, County and Kinsley from

taking any action which would prohibit the Borough from its continued and uninterrupted use of the Kinsley Landfill for solid waste disposal services pending final outcome of this action.

(C) Compelling the County and DEP to revise the Gloucester County Solid Waste Management Plan to reflect any necessary adjustment in capacity at Kinsley Landfill based upon the terms of said interdistrict agreement.

(D) Enjoining and restraining Defendants DEP, County and Kinsley from taking any action which would prohibit the continued and uninterrupted use of Kinsley Landfill by the Borough until such plan revision.

TENTH COUNT

1. Plaintiff hereby repeats and realleges all of the allegations of the Eighth Count as if fully set herein.

2. The certification and modifications to the Plan by DEP and the flow orders issued by DEP require interdistrict contracts between County and other districts whose solid waste is disposed of at Kinsley, including the County of Camden.

3. Such requirements have been imposed at least as early as September 26, 1980, as therein contained in the certification of approval with modification of the original Gloucester County Solid Waste Management Plan by then Commissioner Jerry Fitzgerald English.

4. Notwithstanding the existence of said requirement for more than four years, no such interdistrict agreement has been entered into between the County and the County of Camden.

5. The failure to achieve said interdistrict agreement substantially impairs

the Plan in that it results in a lack of control over the waste generated in the County of Camden and being disposed of at Kinsley, in the same manner and to the same extent as waste from within the County is controlled pursuant to said Plan.

6. Upon information and belief, the County of Camden has failed and refused to negotiate with the County in good faith towards the consumation of such inter-district agreement.

WHEREFORE, Plaintiff Borough of Glassboro demands judgment against Defendants County, DEP, Kinsley and County of Camden as follows:

(A) Enjoining and restraining the County of Camden from disposing of solid waste in the Kinsley Landfill until at least such time as the said County of Camden does negotiate in good faith and

enter into a reasonable interdistrict agreement with the County concerning the use of Kinsley Landfill by the said City of Camden, in accordance with the goals, purposes and parameters of the Gloucester County Solid Waste Management Plan.

(B) Enjoining and restraining Defendants DEP, County and Kinsley from taking any action which would prohibit the Borough from its continued and uninterrupted use of the Kinsley Landfill for solid waste disposal services pending final outcome of this action.

(C) Compelling the County and DEP to revise the Gloucester County Solid Waste Management Plan to reflect any necessary adjustment in capacity at Kinsley Landfill based upon the terms of said interdistrict agreement.

(D) Enjoining and restraining Defendants DEP, County and Kinsley from

taking any action which would prohibit the continued and uninterrupted use of Kinsley Landfill by the Borough until such Plan revision.

Joseph F. Lisa
Attorney for Defendant
Borough of Glassboro

Dated: October 17, 1984.

October 11, 1984

Borough of Glassboro
Municipal Building
Glassboro, N.J. 08028

Gentlemen:

We regret to inform you that the Gloucester County Board of Chosen Freeholders on September 24, 1984 inexplicably refused to approve the expansion of our landfill. This action was taken even though the County's Solid Waste Advisory Council recommended the ten-year expansion that we had sought since the landfill is reaching its approved design capacity as determined by the New Jersey DEP.

Running out of approved space means we will no longer be able to accept your waste. We hereby are notifying you pursuant to paragraph 13 of our agreement that we are terminating that agreement. Our engineers have estimated, based upon anticipated volume, that the approved design capacity will be reached during the week of October 28, 1984. We will continue to take your waste as long as we can, but you should plan for switching to another facility on relatively short notice since we cannot at this point give you the exact date when capacity will be reached.

Very truly yours,

KINSLEY'S LANDFILL, INC.

By: /s/ Charles J. McMuillin
Charles J. McMullin,
President.

CJM/amw
CERTIFIED MAIL, R.R.R.

## VERIFICATION

STATE OF NEW JERSEY :

COUNTY OF GLOUCESTER : SS

WILLIAM L. DALTON, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the Mayor of the Borough of Glassboro, the Plaintiff in the within action.

2. I have read the foregoing complaint, and on my own personal knowledge, I know that the facts set forth therein are true and they are incorporated in this affidavit by reference.

/s/ William L. Dalton
William L. Dalton

Sworn to and subscribed
before me this 17th day of October, 1984.

/s/ Doris H. Dorofee
DORIS H. DOROFEE
NOTARY PUBLIC OF NEW JERSEY

## CERTIFICATION

STATE OF NEW JERSEY

COUNTY OF GLOUCESTER

I, Richard Peluso, do, under penalty of perjury, hereby certify and affirm that the following statements are true to the best of my information, knowledge, and belief:

1. I am a principal in the firm of Wehran Engineering which firm has been responsible for preparing the design drawings for the Kinsley's Landfill, Inc. located in Deptford Township, New Jersey ("Kinsley's"). I am familiar with the design approved for the facility by the New Jersey Department of Environmental Protection ("DEP"). I am a professional engineer licensed in New Jersey and New York, and have had considerable experience in designing sanitary landfills and preparing environmental safeguards for such facilities.

2. Wehran Engineering prepared the drawings for the engineering design of Kinsley's which were approved by the DEP when it issued to Kinsley's a Certificate of Approved Registration and Engineering Design, approved on September 24, 1980.

3. The current plans for a part of th expansion of Kinsley's call for a lateral expansion into virgin ground. The construction time for such lateral expansion would be approximately nine (9) month before such area could be filled, provided construction begin now.

4. In order to continue to use the Kinsley's facility immediately, the only area that can be used is the top of the existing landfill area. This area is approximately sixty-nine (69) acres in size.

5. The minimum practical operational unit is a lift which consists of twelve (12) feet of compacted solid waste.

6. A twelve (12) foot lift equals an in place volume of 1,336,000 cubic yards, which is approximately 3,000,000 truck cubic yards, which is sufficient for about six (6) months more use of the facility. This will result in an elevation of approximately 180 feet; the approved design height is 165 feet.

7. The landfill was designed to insure proper stability up to a height of 230 feet. Therefore, raising the existing elevation of 164 feet, by 16 feet to an elevation of 180 feet, will not have any impact on the stability of the landfill.

8. The existing storm drainage and leachate management systems are capable of handling this additional volume.

9. The operation for this one lift will, in my opinion, be relatively expensive as a new cap will have to be

constructed over the entire area, and the landfill gas system will also have to be reconstructed, thus necessitating an application to the Board of Public Utilities for emergency rate relief.

/s/ Richard Peluso
Richard Peluso

Dated: October 18, 1984

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| BOROUGH OF GLASSBORO, a Municipal Corporation of the State of New Jersey | SUPERIOR COURT OF NEW JERSEY LAW DIVISION GLOUCESTER COUNTY |
| Plaintiff, | DOCKET NO. |
| vs. | Civil Action |
| GLOUCESTER COUNTY BOARD OF CHOSEN FREEHOLDERS, THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROBERT E. HUGHEY, Commissioner of the New Jersey Department of Environmental Protection, KINSLEY LANDFILL, INC., THE CITY OF PHILADELPHIA and THE COUNTY OF CAMDEN, | ANSWER OF DEFENDANT, CITY OF PHILADEPHIA |
| Defendants. | |

Defendant, City of Philadelphia, by way of Answer to the Complaint of plaintiff, says:

FIRST THROUGH EIGHTH AND TENTH COUNTS

As no relief is requested against answering defendant in these Counts, no responsive pleadings thereto are required.

NINTH COUNT

1. Answering defendant responds to the paragraphs of the Eighth Count incorporated in this paragraph as follows:

1. Answering defendant responds to the paragraphs of the First Count incorporated in this paragraph as follows:

1.-9. Admitted.

12. Denied.

13. To the extent the factual allegations of this paragraph can be construed to pertain to answering defendant, it is denied; the remainder of this paragraph is denied as a conclusion of law.

2. Admitted.

3. Denied.

4. Denied.

2. Denied as stated. It is admitted only that the DEP as of July 26, 1983, has specificially directed that Gloucester County enter into such a contract with the

City of Philadelphia. The allegation that the City is a "district" is denied as a conclusion of law to which no responsive pleading is necessary.

3. Denied.

4. Denied as stated. It is admitted only that no formal inter-district agreement has been entered into between the County and the City, although an agreement in principle was reached between the parties in August, 1984.

5. Denied as a conclusion of law to which no responsive pleading is necessary.

6. Denied.

7. Denied.

WHEREFORE, answering defendant demands judgment dismissing plaintiff's Complaint and awarding us the costs and counsel fees incurred in defense of this action.

SEPARATE DEFENSES

1. The Complaint fails to state a claim against answering defendant upon which relief can be granted.

2. Plaintiff lacks standing to assert the claims asserted against answering defendant.

3. This Court lacks subject matter jurisdiction over the claims asserted against answering defendant allegedly arising from a violation of DEP rules and regulations.

4. Granting of the relief sought against answering defendant would violate the Commerce Clause of the United States Constitution.

5. The assertion of plaintiff's claims against answering defendant are barred by the doctrines of laches, waiver, estoppel and unclean hands.

6. Answering defendant has at all times negotiated in good faith with the County of Gloucester.

7. While no formal agreement has been consummated, answering defendant has reached an agreement in principle with the County of Gloucester regarding its waste flow into Kinsley Landfill.

8. The failure to conclude a formal waste flow agreement between answering defendant and the County of Gloucester was the result of the bad faith, obdurate behavior and unreasonable and unconstitutional demands of the County of Gloucester in the course of negotiations.

TOMAR, PARKS, SELIGER, SIMONOFF, & ADOURIAN
Attorneys for Defendant, City of Philadelphia

By: Steven K. Kudatsky /s/
STEVEN K. KUDATSKY

Dated: 10/22/84

CERTIFICATE OF SERVICE

I hereby certify that the original and two copies of the within Answer of Defendant, City of Philadelphia, has been filed with the Honorable Samuel G. DeSimone at the Gloucester County Superior Court in Woodbury, New Jersey by hand-delivery, this date. I further certify that one copy of the aforesaid was served upon all counsel by hand delivery, this date.

Steven Kudatsky /s/
STEVEN KUDATSKY

Dated: October 23, 1984

SUPERIOR COURT OF NEW JERSEY
GLOUCESTER COUNTY - LAW DIVISION
DOCKET NO. L-070476-84 PW

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|---|---|---|
| BOROUGH OF GLASSBORO, a municipal corporation of the State of New Jersey, et als, | : | |
| Plaintiffs, | : | STENOGRAPHIC TRANSCRIPT |
| vs. | : | of Decision |
| GLOUCESTER COUNTY BOARD OF CHOSEN FREEHOLDERS, THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROBERT E. HUGHEY, Commissioner of the New Jersey Department of Environmental Protection, KINSLEY LANDFILL, INC., THE CITY OF PHILADELPHIA and THE COUNTY OF CAMDEN, | : | |
| Defendants. | : | |

PLACE: Gloucester County Courthouse
Woodbury, New Jersey

DATE: November 15, 1984

B E F O R E:

HONORABLE SAMUEL G. DeSIMONE, AJSC

A P P E A R A N C E S:

JOSEPH F. LISA, ESQUIRE
Attorney for Glassboro, Clayton and Monroe

HOFFMAN, DiMUZIO & HOFFMAN, ESQUIRE
BY: JOSEPH J. HOFFMAN, JR., ESUQIRE
Attorney for Franklin Township

WALTER L. MARSHALL, ESQUIRE
Attorney for Wenonah and Westville

THE COURT: Gentlemen, I have considered this emergent application. This Court, as I stated earlier because of the multitude and complexity of this particular problem, this awesome decision which this Court has to make in regard to this crisis that has been lingering now for the several weeks that this matter has been before the Court, has conscientiously considered the arguments of all counsel in regard to this matter. I have allowed Mr. Kudatsky to produce engineering testimony. As the Court stated on the record and I will reiterate, that I was concerned about the slope's stability in regard to any additional lifts.

In regard to presently what's before me, I have considered the application. I concluded the testimony of Mr. Steiner. I have also considered the testimony that was

before this Court prior hereto. I cannot ignore Mr. Burshtin's testimony. One lift ordered by the Court two day's ago, as Mr. Schneider pointed out, incidental to the order of the closing of Kinsley requires a safety net. I think that was the term that he alluded to.

I reviewed Mr. Burshtin's testimony in regard to the first hearing before this Court, which I believe was on October 26. I was tremendously impressed with Mr. Burshtin's testimony. The original design of the landfill, as he testified according to my recollection, went up to 230 feet. He had many questions concerning even a small expansion. His testimony as I recall it, and I am alluding to Mr. Burshtin, the expert produced by DEP, that the design up to 230 feet was never evaluated. He had many questions on this design, that is, of

going higher. He had questions even in regard to a small expansion at that time. He had questions in regard to slope stability; and if I recall correctly, he alluded to some problems in a Northern landfill, I believe, concerning slope stability. He alluded to the major North Jersey problem or Northern problem as he called it. And I want to emphasize to all of you gentlemen, ladies and gentlemen in these proceedings, Kinsley Landfill is no longer operating as a landfill, as a private landfill; it is operating on an emergent basis pursuant to a Court Order and DEP approval of the minimal of a one lift expansion.

This litigation has not concluded. This Court has entered a preliminary injunction as to Philadelphia disposal of solid waste. My former opinion was based upon a fine tune inter-dependent happening of events to

insure the orderly closure of Kinsley Landfill. To undo it now as the facts stand before me today and as they stood before me prior hereto would be catastrophic.

I have considered the testimony of Mr. Lou Steiner today as to an additional life but I am persuaded by the concerns espoused by Mr. Burshtin. And under our laws and under our rules as I understand it, it is up to me as the trier of fact as to what weight I give to experts' testimony. Although the law, as I understand it, gives me great liberality that is afforded experts, it is up to me. I can accept parts; accept it all; reject parts; accept parts. And again I will state for the record, that I was persuaded by his concerns, and that was Mr. Burshtin, in re slope stability of the Kinsley Landfill.

will accept his one lift, approval of the one lift.

Again, in balancing the equities, this Court has chosen a path which would subject the citizens to the least amount of risk during this emergent situation. For those reasons, I deny your request Mr. Kudatsky. I exercise my discretion, no bond is to be posted by the municipalities or county involved under the rules alluded to by Mr. Kudatsky, the bond on appeal. This is done within the sound discretion of the Court to my knowledge and I can take note that all the municipalities are before me as well as the County of Gloucester are solvent.

In addition thereto Mr. Kudatsky, again I will re-emphasize for the record that you have the right to make an application to me for prompt emergent case management if you so desire. This Court is extremely busy.

However, I wear two hats. I am not only Assignment Judge for Gloucester, Cumberland and Salem County; I am also Civil Assignment Judge for Gloucester and Salem County; so the buck stops here. In regard to case management, you can make your request directly to me and I will take it under advisement.

For those reasons gentlemen, Mr. Kudatsky, I deny your request today. Mr. Lisa, again, I will call upon you to prepare an order and submit it to me.

# REPORT OF A TIMETABLE FOR THE ORDERLY CLOSURE OF KINSLEY LANDFILL AND WASTE FLOW REDIRECTIONS RELATIVE THERETO

Prepared By: New Jersey Department of
Environmental Protection,
Division of Waste Management

## INTRODUCTION

This report is prepared pursuant to a temporary restraining order entered by the Honorable Samuel G. DeSimone, A.J.S.C. on October 26, 1984 in the matter of Borough of Glassboro v. Gloucester County Bd. of Chosen Freeholders, et al.

The temporary restraining order contemplates that the court will order that the Kinsley Landfill be expanded vertically for one additional lift of compacted solid waste. Accordingly, Kinsley was ordered to submit to the Department of Environmental Protection complete engineering designs for such an expansion. DEP's review of the engineering designs is the subject of another report submitted to the court. That report does indicate that from an environmental point of view, it is possible for there to be a vertical expansion of the

Kinsley Landfill for one additional lift of compacted solid waste, which expansion could be conducted in a manner which complies with applicable engineering criteria. Since DEP understands that in light of its review of the engineering design the court will order that the Kinsley landfill stay open until this expanded capacity is reached, it has prepared this report

At present there is a critical shortage of solid waste disposal facilities in the State of New Jersey which has reached a crisis stage. There are very few operating landfills remaining in the State of New Jersey, and may of those that are remaining are rapidly running out of disposal capacity. At present, there are few proposals for additional landfills that have even reached the planning stage, and no additional landfills are presently under

construction. A similar situation exists for resource recovery facilities. Resource recovery facilities are essential for a long-term solution to New Jersey's solid waste disposal crisis.

PRESENT WASTE FLOW REDIRECTION ALTERNATIVES

DEP has examined the alternative solid waste disposal sites in the State of New Jersey. As set in Exhibit A annexed hereto, DEP concludes that at present there are in fact no alternative sites in the State of New Jersey to which it would be feasible to redirect the waste flows presently disposed of at the Kinsley Landfill. With respect to sewerage sludge, such sludge is already required to cease landfill disposal by March 15, 1985 pursuant to statute and regulations.

IMMEDIATE SITING OF NEW LANDFILLS

Due to the present absence of acceptable

alternative landfill facilities located in the State of New Jersey, it is essential that additional landfill sites be implemented on as expeditious a schedule as is possible. At present most of the waste generated in the State of New Jersey which is disposed of at the Kinsley Landfill (a minority of the total waste flow to the landfill) comes from the counties of Camden and Gloucester and, to a lesser extent Salem. In order to provide for alternative in-state disposal sites when the expanded Kinsley Landfill reaches capacity, these three counties must be required to immediately site and implement landfills within their borders.

The implementation of new landfills by Camden, Gloucester, and Salem Counties must be done on an expedited schedule. This may require that the counties

proceed simultaneously with steps which would ordinarily proceed sequentially. However, any plan for the orderly closure of the Kinsley Landfill must require these counties to immediately implement alternative landfills. Attached hereto as Exhibits B and C are proposed Administrative Consent Orders for Camden and Gloucester counties which provide for the expeditious implementation of landfills, as well as timetables for implementation of resource recovery in order to provide a long-term solution to solid waste disposal needs in these counties.

Due to the complexity of implementing a landfill, and in particular the procedures attendant upon issuance of an approved registration (permit), this process ordinarily requires at least 24 months. However, where necessary in order to comply

with a judicial decree and to prevent disruption in the operation of a solid waste management plan, a facility may be temporarily exempted from the requirement of an approved registration pursuant to N.J.A.C.7:26-1.7, and may operate pursuant to a temporary certificate of authority. If this approach is followed in this case, the new landfills could be operational within 12 months.

PHILADELPHIA WASTE FLOWS

Unfortunately, DEP review indicates that at present rates of waste disposal at the Kinsley Landfill, the capacity of one new lift might be reached in less than four months. Waste generated within the City of Philadelphia and other Pennsylvania communities accounts for the majority of the waste disposed of at the Kinsley Landfill. Accordingly if Kinsley Landfill ceased

accepting this waste, it is projected that the capacity of the expanded landfill would not be reached for approximately one year.

Again we note the critical shortage of landfill disposal space within the State of New Jersy. Protection of the public health, safety and welfare presents an urgent need to preserve this limited space so that it will be possible to provide some place for the disposal of solid waste generated within this State until long-term solutions to this waste disposal crisis are implemented.

The Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., provides a scheme for regulating waste disposal in the State of New Jersey. Each of the 21 New Jersey counties and the Hackensack Meadowlands district is designated a solid waste management district. Pursuant to that Act and

DEP's implementation thereof, no waste generated outside of a solid waste management district may be disposed of within that district except in accordance with an interdistrict agreement between said district and the jurisdiction where the waste is generated. This requirement applies uniformly and without distinction between wastes generated within the State of New Jersey and wastes generated outside the State. To date, there is no agreement between the City of Philadelphia or any other Pennsylvania Community and the County of Gloucester. The counties of Camden and Salem have reached such agreements. DEP accepts the representations of Gloucester County that it has negotiated in good faith.

DEP understands that Philadelphia has stated it can accommodate the closure of Kinsley Landfill.

Accordingly, given all of these circumstances, it is proposed that within two weeks Kinsley Landfill must cease accepting all solid waste generated within the City of Philadelphia and other Pennsylvania communities. Without this waste, the one lift expansion at the Kinsley Landfill should have sufficient capacity to allow time for the landfill facilities to come on line.

WASTE FLOW REDUCTIONS THROUGH RECYCLING

Finally, in order to maximize the capacity in the expanded Kinsley Landfill, all communities using the landfill must be required to substantially increase their recycling efforts. Accordingly, all plaintiff municipalities should be directed to report to the court within two weeks with plans they are implementing to further maximize recycling. Those municipalities which do not presently provide curbside

pickup of recyclables must provide same or set forth a compelling reason for their failure to do so. Similarly, municipalities which do not have mandatory recycling ordinances must do likewise.

Municipalities which do have curbside pickup and/or mandatory ordinances must increase efforts at public awareness and enforcement. Communities in Camden County which use the Kinsley Landfill should be required to do likewise, with Camden County coordinating these efforts. While the additional landfill capacity which may be gained in this manner cannot presently be measured, under the circumstances any further reduction in waste flows to Kinsley Landfill is significant.

## CONCLUSION

Accordingly, the Department of Environmental Protection proposes the

following for the orderly closure of the Kinsley Landfill when the vertical expansion of one additional lift of compacted solid waste reaches its capacity, and the waste flow redirections associated therewith:

1. The Counties of Camden, Gloucester, and Salem shall proceed immediately with implementation of one of more landfills within their borders, with such landfills to become operational within 12 months in accordance with Exhibits B and C attached hereto and an order of this court.

2. Within two weeks Kinsley Landfill shall cease accepting all solid waste generated within the City of Philadelphia and other Pennsylvania communities and other out of district solid waste not subject to interdistrict agreements.

3. Within two weeks all municipalities using the Kinsley Landfill shall maximize

their recycling efforts, including curbside pickup, mandatory ordinances, stepped up public awareness campaigns, and increased enforcement efforts, and shall report to the court and the DEP on same.

4. Other wastes presently disposed of at the Kinsley Landfill will be disposed of at the vertical expansion to the Kinsley Landfill until it reaches capacity, at which time said wastes are redirected to the new landfills to be implemented in the Counties of Camden, Gloucester, and Salem.

5. Disposal of sewage sludge at Kinsley landfill shall cease on March 15, 1985.

ANALYSIS OF ALTERNATIVES TO KINSLEY LANDFILL

Salem County: Salem only sends a small amount of waste to Kinsley, but there are no realistic alternatives to Kinsley for this waste. The one BPU regulated facility in the County, the Pennsville Township Landfill (DEP # 1708A), is presently out of capacity, and the Department has initiated closure proceedings. The Township has indicated a desire to expand, but does not accept the need to install environmental improvements. Finally, the facility's BPU tarrif [sic] restricts disposal to Pennsville waste only.

Camden County: Camden has two operating landfills; both have constraints on their ability to accept increased waste loadings.

- Pennsauken Township Landfill, DEP

Exhibit "A"

#0427A, is BPU registered and accepts most non-hazardous waste.[1] The facility has permitted capacity, at present loading rates, for approximately 14 months, but the actual construction of the liner for the facility is conducted in stages, with only a small area being prepared at a time. This procedure was approved by the Department as part of the facility's registration. In addition, Department engineering staff have concerns that the liner sections for these soon-to-be-

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[1] The facility's DEP registration allows all but Type 25, animal and food processing waste; their BPU tarrif prohibits both Type 25 and Type 23, vegetative waste.

utilized sections may or may not have been completed in a manner consistent with the facility's registration. Acceptance of additional waste at this facility would hinder construction of the new liner sections, making uninterrupted access to the facility uncertain, and would shorten the life of the permitted portions to approximately six months. In addition, the facility would be hard pressed to acquire equipment, etc. for a significant increase in waste loadings. Although the County has received Department approval for a plan amendment which would allow an additional 45 acre expansion of this landfill, no engineering plans or permit

materials have yet been filed.

- Winslow Townhip Landfill, DEP # 0436A, is BPU registered and can accept all [non-hazardous] waste types. However, the facility's BPU tarrif [sic] restricts waste acceptance to Winslow Township, Waterford and Chesilhurst, and the fact that the facility is in the Pinelands Preservation area means that additional waste loading must, according to the Pinelands Comprehensive Management Plan [Section 6-794[5]], be restricted to "Pinelands Counties", that is, counties with at least 50% of their land area in the Pinelands. Camden is not a Pinelands county, neither is Gloucester. The facility has capacity for a number of

years for its own relatively small waste stream; signficant [sic] new waste loadings would significantly reduce this expected lifetime.

Burlington County: Burlington has two remaining private landfills,[2] but the Department is strongly opposed to redirection of waste into this county. Burlington has crafted a plan based on the careful metering out of the remaining capacity so that the county is assured of adequate capacity for its own waste until its county-owned landfill is operational. Burlington had agreements with Mercer County, Camden County, and the City of Philadelphia; these called for the importing districts to end their waste

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[2] Parlands, 0304A, and L&D, 0323A.

flows into Burlington in order to ensure this capacity for the county, and all have complied. (Burlington also had similar agreements with a host of private haulers; most have expired, and these haulers are no longer disposing in the county. Two or three haulers are still permitted to dispose in the county under agreement.) The Burlington landfills are environmentally troublesome also. The Department recently moved against Parklands, alleging more than 400 violations of the Departments [sic] regulations and its engineering design. L&D is a Superfund site.

Atlantic County: Most wastes in Atlantic County are disposed of at the Pinelands Park landfill (0108B), which is scheduled to close December 31, 1985.

Cape May County: Cape May recently opened a new county-owned landfill (0511C),

for the exclusive acceptance of the county's waste. Since Cape May generates a relatively small waste stream, and since the landfill only is permitted for use until 1990, when landfilling in the Pinelands must cease, additional waste loadings here would unacceptably reduce this facility's life, and create problems for the county plan. In addition, the Cape May landfill is located in the Pinelands, making additional waste acceptance from non-Pinelands counties difficult or impossible. Also, since the Cape May facility is some 50 miles from Kinsley, it would make as much sense to direct the waste to Colebrookdale as it would to direct it to Cape May, without the associated disruptions to New Jersey county planning activities.

Ocean County: Ocean county has just signed an ACO with the Department which pro-

vides for the same type of metering of in-county capacity (as is contained in the Burlington County Plan) until a resource recovery facility is developed and operational.[3] In addition, Ocean County is at least as far as Colebrookdale, so redirection makes little sense, in the same sense as Cape May, in that disruption to an on-going planning and facility development process would result.

Middlesex County: Closure of one of the two major private landfills (ILR, 1205C) in Middlesex is imminent, and extremely high loadings (close to 1000 trucks per day) at the other (Edgeboro, 1204A) make redirection to this landfill unrealistic.

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[3] Ocean County has two private landfills with significant capacity; Ocean County Landfill Corp., 1518B, and Southern Ocean Landfill, 1520A.

## LANDFILL AGREEMENT

THIS AGREEMENT, made this 22nd day of August, 1984, by and between R.R.M. CORPORATION, a Pennsylvania Corporation, t/a COLEBROOKDALE LANDFILL, R.D. #3, Box 607, Boyertown, Pennsylvania 19512 (hereinafter referred to as "landfill")

AND

Gloucester County, New Jersey, and or its designated authority, with its principal place of business at the Court House, Woodbury, New Jersey 08096 (hereinafter referred to as "supplier").

WITNESSETH:

WHEREAS, Landfill operates and maintains a sanitary landfill at Shenkel Hill Road, in Earl Township, Berks County, Commonwealth of Pennsylvania (hereinafter referred to as the "Site"); and

WHEREAS, Supplier has, from time to time, quantities of waste materials

(hereinafter referred to as the "Waste Materials") which Supplier desires to dispose of at the Site, and Landfill is willing to allow Supplier to dispose of its Waste Materials at the Site, in accordance with the terms and conditions set forth hereinbelow.

NOW, THEREFORE, the parties hereto, in consideration of the promises and mutual convenants and agreements herein contained, and intending to be legally bound, hereby agree as follow:

1. Disposal of Waste Materials. Landfill hereby agrees to permit Supplier to dispose of up to ---------- (N/A) cubic yards/ 650 (650) tons per day of Supplier's Waste Materials at the Site, subject to the terms and conditions and limitations set forth herein.

2. Weekly Volume of Waste Materials. Supplier agrees that the Waste Materials to

be disposed of at the Site shall be provided in reasonably uniform weekly volume. The weekly volume of Waste Materials shall not be less than 1,250 (1,250) tons during any thirty (30) day period during the term of this Agreement.

3. Compensation of Landfill.

(a) Supplier shall pay Landfill as compensation for the disposal of the Waste Materials at the Site in accordance with the compensation schedule set forth in Exhibit "A", attached hereto and made a part hereof (hereinafter referred to as the "Basic Rate")

(b) In the event that the volume of Waste Materials is not within the minimum range set forth in Paragraph 2 hereinabove during any thirty (30) day period, Supplier agrees to pay to Landfill the basic rate applicable to the minimum quantity of 1,250 tons per week in any event.

(c) Terms of payment under this Agreement are net ten (10) days.

4. Term. The term of this Agreement shall be for the period of four (4) year(s), commencing on the 1st day of September, 1984, and ending on the 31st day of August, 1988.

5. Nature of Waste Materials. The parties hereto understand and agree that the Waste Materials to be disposed of at the Site shall consist solely of the items set forth in Exhibit "B" attached hereto and made a part hereof. Notwithstanding anything herein contained to the contrary, under no circumstances shall Landfill accept or Supplier dispose of any Waste Materials at the Site which constitute "hazardous Waste" as defined in the Pennsylvania Solid Waste Management Act, July 7, 1980, P.L., No. 97, as amended,

and/or any liquid or contained gaseous materials, and/or any other Waste Materials which Landfill, in its sole and exclusive discretion, deems objectionable, obnoxious, noxious, toxic, and/or otherwise environmentally harmful, or which may materially increase hazards or risks to health, or exceed any current or future capacity limit of the Site, cause operating problems at the Site, or adversely affect Landfill's ability to comply with any and all laws, ordinances, rules, regulations, and licenses under which it operates.

6. Landfill Operation. The Site shall be open for business during the hours of 7:00 A.M. to 5:00 P.M., Mondays through Fridays, and 7:00 A.M. to 12:00 noon Saturdays. Any vehicle of Supplier carrying Waste Materials to the Site shall register at the office of Landfill prior to

entering upon any property of Landfill. Landfill shall designate the location at the Site where Supplier's Waste Materials shall be disposed of. Landfill reserves the right to change hours of operations and/or the location where Supplier's Waste Materials shall be disposed of without prior notice to Supplier, if as a result of changes in applicable laws, ordinances, regulations, rules, or licensure. Landfill shall have the right at any time or times to make such rules and regulations as in its judgment maybe necessary for safety, care, cleanliness and for the preservation of good order at the Site. Landfill shall also have the right, in addition to any other rights reserved herein, to required Supplier and/or Supplier's hauler to provide Landfill with evidence, in form satisfactory to landfill, that any load of the

Waste Materials is in compliance with the requirements of Paragraph 5 hereof.

7. Insurance. Landfill agrees to carry necessary insurance coverage with respect to public liability and property damage. Notwithstanding the foregoing, Supplier (and Supplier's hauler) shall also carry satisfactory standard insurance coverage with respect to public liability and property damage and shall, upon request of Landfill, provide Landfill with certificates of such insurance coverage.

8. Indemnity. Supplier (and Supplier's hauler) covenants and agrees to indemnify and hold harmless Landfill, its directors, officers, employees, and agents, from and against any and all liabilities, penalties, fines, demands, claims, causes of action, suits, losses, damages, costs, and expenses (including costs of defense,

settlement, and reasonable attorney fees) which any or all of them may suffer, incur, be responsible for, or pay out, arising out of or resulting from any direct or indirect violation of the terms, covenants, and conditions of this Agreement by Supplier, its directors, officers, employees, hauler or agents, including but not limited to, any of the foregoing arising out of Supplier's disposal of hazardous waste as hereinabove defined at the Site, and/or resulting from any contamination of or adverse effects upon humans, animals, aquatic and wildlife, food, animal feed, land, or water, by reason of Supplier's inclusion in any shipment of Waste Materials to Landfill or any materials or substances not described in Exhibit "B", or otherwise prohibited under Paragraph 5 hereinabove. Upon the request of Landfill, Supplier shall promptly defend

any such demand, claim, cause of action, or suit, and/or make the required payments hereunder. Supplier agrees to and shall take all necessary and appropriate precautions to prevent any such violation, contamination, or adverse effects and any such loss or damage to property or person.

9. Transportation of Waste Materials. Supplier shall transport the Waste Materials to the Site at Supplier's sole risk, cost and expense. Landfill shall have the absolute right to approve of the hauler selected by Supplier to transport the Waste Materials to the Site. Supplier's hauler shall take all necessary and appropriate precautions in the transportation and delivery of Waste Materials to the Site in order to avoid injuries to persons and damage to property. Supplier and its hauler shall give all

required notices and comply with all rules and regulations of Landfill with respect to the Site, and all applicable federal, state, county, township, and local laws, ordinances, rules, regulations, and orders with respect to transportation of the Waste Materials. Trucks carrying Waste Materials to the Site shall be adequately sealed and covered (with tarp or its equivalent) to prevent the Waste Materials from blowing away and/or littering the highways and/or the Site. Any Waste Materials consisting of sludges shall be transported to the Site in leak-proof containers to prevent leakage of sludge upon the highways leading to the Site and/or the Site. Supplier covenants and agrees to indemnify and hold harmless Landfill, its directors, officers, employees, and agents, from and against any and all liabilities, penalties, fines,

demands, claims, cause of action, suits, losses, damages, costs and expenses (including costs of defense, settlement, and reasonable attorneys fees) which any or all of them may suffer, incur, be responsible for, or pay out arising of or resulting from any direct or indirect action or failure to act by any hauler of Supplier, or resulting from any direct or indirect action or failure to at by any hauler of Supplier, or resulting, directly or indirectly, from Supplier's and/or Supplier's hauler's failure to comply with the terms, covenants, and conditions herein. Upon the request of Landfill, Supplier shall promptly defend any such demand, claim, cause of action, or suit, and/or make the required payments hereunder. Supplier and its hauler shall give Landfill prompt notice of any acci-

dent, spill or leakage occurring on or to the Site and/or upon the highways leading to the Site. Landfill reserves the right to bar any hauler, acting on behalf of Supplier, from the Site in the event Landfill, in its sole discretion, determines that such hauler is, or may be, acting or has acted, contrary to the rules and regulations of Landfill with respect to the Site, or otherwise in violation of the terms, covenants, and conditions of this agreement, or that the condition of said hauler's vehicles or performance of said hauler's drivers may pose or present a possible hazard to persons or property at or about the Site.

10. Title to Waste Materials. Except as otherwise provided herein, upon deliver of the Waste Materials by Supplier and/or its hauler to the Site, title to the Waste

Materials shall thereupon rest with and b transferred to Landfill. Notwithstanding the foregoing, in the event that Landfill discovers, after having taken title to the Waste Materials, that the Waste Materials, or any of it, does not conform to the specifications set forth in Exhibit "B" hereto and/or is in violation of the provisions of Paragraph 5 of the Agreement, Landfill may revoke its acceptance of the Waste Materials. In the event of such a revocation of acceptance of the Waste Materials. In the event of such a revocation of acceptance, title to the Waste Materials shall immediately revest in Supplier, and Supplier agrees to and shall be soley responsible and liable for the removal of the Waste Materials from the Site and shall be responsible, answerable, and accountable for any loss, damage, or expense resulting from said non-conformity and/or violation,

including, but not limited to, the cost of removal of the Waste Materials from the Site. Anything in the foregoing paragraph to the contrary notwithstanding, Supplier shall have no liability with regard to, ownership of, Waste materials other than those proven, by competent evidence, to have been deposited at the Site by Supplier and/or its hauler.

11. Landfill's Right to Terminate Agreement. Landfill reserves the right to terminate this Agreement at any time during any term hereof at its sole discretion in the event Supplier and/or Supplier's hauler violates any of the terms, covenants, and conditions hereof; in the event the business of Landfill is discontinued or curtailed at the Site; or in the event Supplier is adjudged a bankrupt, makes a general assignment for the benefits of cre-

ditors, files a petition in bankruptcy or for the appointment of a receiver, or seeking reorganization under any provisions of the Federal Bankruptcy Law or any state insolvency acts.

12. Contingency. Landfill's obligation to perform hereunder is expressly contingent upon landfill's ability to obtain from time to time, from all necessary governmental agencies and bodies, permission and/or approval or permits to use additional grounds of landfill for the disposal of solid waste, as needed from time to time, in connection with landfill's business. This Agreement is further contingent and shall not take effect or continue to be in effect until and unless Kinsley Landfill is not available for use by Supplier.

13. Assignment. This Agreement shall not be assigned in whole or in part by

either party hereto without the written consent of the other party, but with that exception shall extend to and be binding upon the heirs, executors, administrators, successors, and assigns of the parties hereto.

14. Force Majeure. Performance of this Agreement may be suspended and the obligations hereunder excused in the event and during the period that such performance is prevented or made substantially impractical by a cause or causes beyond the reasonable control of the party seeking suspension or excuse of its performance or obligations. Such causes shall include but not be limited to acts of God, acts of war, riot, fire, explosion, accident, sabotage, flood or severe weather condition; lack of adequate fuel, power or raw materials; judicial administration or governmental

laws, regulations, rules, requirements, orders or actions, including cancellations, suspension or revocation or modification of any permit, license, or other authorization necessary to perform pursuant to this Agreement, injunctions or restraining orders; failure of any governmental body to issue or grant licenses, permits, or other authorizations necessary to perform pursuant to this Agreement; national defense requirement; labor, strike or lockout.

15. Governing Law. This Agreement shall be governed by and construed according to the laws of the Commonwealth of Pennsylvania.

16. Entire Agreement. This Agreement constitutes the entire agreement between the parties hereto, and no conditions, uses of trade, courses of dealing or performance, or understandings or agreement pur-

porting to modify, vary, explain, or supplement the terms or conditions hereof shall be binding unless reduced to writing and signed by the parties hereto.

17. Notices. All notices required to be given hereunder shall be in writing and sent certified mail, return receipt requested, to the address set forth at the beginning of this Agreement.

18. Miscellaneous.

(a) In the event Supplier fails to fulfill the terms of payment, set forth hereinabove, or in case Landfill shall have any doubts as to Supplier's financial responsibility, Landfill may decline to accept further deliveries of Waste Materials from Supplier except upon receipt of case or satisfactory security therefor. Landfill may require, from time to time, that Supplier provide Landfill with

appropriate credit references attesting to Supplier's financial responsibility.

(b) Supplier and/or Supplier's hauler shall provide Landfill, upon request, with copies of all necessary governmental licenses, certificates, approvals, permits, or permissions necessary or required for the performance of any and all of Landfill's services hereunder for Supplier.

(c) Supplier shall immediately notify Landfill should any such governmental license, certificate, approval, permit, or permission be suspended, revoked, or impaired in any respect. Any such suspension, revocation, or impairment of same shall confer upon Landfill the immediate unqualified right of termination of this Agreement.

(d) Nothing contained herein shall create a master/servant,

employer/employee, or principal/agent relationship between the parties hereto, and under no circumstances shall Supplier, Supplier's employees or agents and/or Supplier's hauler or hauler's employees be considered the employees, agents, or servants of Landfill at any time, under any circumstances, or for any purpose.

(e) Paragraph headings are inserted for convenience only and shall not constitute a portion of this Agreement nor shall they affect its meaning, construction or effect.

(f) All times stated herein for performance shall be deemed to be of the essence of this Agreement.

(g) This offer by Landfill shall be good for a period of sixty (60) days from the date hereof, unless accepted and a copy hereof shall be delivered by Supplier on or before said date to Landfill.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

R.R.M. CORPORATION

Attest: /s/ Secretary BY: /s/ President

(CORPORATE SEAL) SUPPLIER:

_____

Witness: _____ BY: _____ (SEAL)

SURCHARGE RATE

$ N/A per cubic yard of Waste Materials

$_____ per ton of Waste Materials

BASIC RATE - Effective 10/1/84

| Year | A* Price per cu./yd | B* Price/Ton |
|---|---|---|
| 1 | $10.00 | $35.00 |
| 2 | $12.00 | $42.00 |
| 3 | $14.00 | $49.00 |
| 4 | $16.00 | $56.00 |

*whichever is the greater of A or B shall constitute the basic rate (as determined by landfill)

EXHIBIT "A"
COMPENSATION SCHEDULE

Supreme Court, U.S.
FILED
NOV 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-707

In The

# Supreme Court of the United States

October Term, 1985

CITY OF PHILADELPHIA,
*Petitioner,*

v.

BOROUGH OF GLASSBORO, *et al.*,
*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY**

**BRIEF AND APPENDIX IN OPPOSITION ON BEHALF OF RESPONDENTS STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ROBERT E. HUGHEY, COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION**

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BEST AVAILABLE COPY

## COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Supreme Court has jurisdiction to grant a writ of certiorari to the Supreme Court of New Jersey which affirmed, on interlocutory appeal, a preliminary injunction entered by a New Jersey trial court, where the case is still pending before the trial court and is scheduled for trial in January 1986 at which the state court will make a final determination of petitioner's federal claims.

2. Whether a preliminary injunction entered by a New Jersey court in order to avoid an imminent local public health crisis, that enjoins from disposal at an exhausted sanitary landfill in New Jersey solid waste generated in Philadelphia and other communities both within and without New Jersey which have available alternative waste disposal sites, and authorizes certain local communities with no present waste disposal alternatives to continue using the landfill on a temporary, conditional basis while they develop alternatives, violates the Commerce Clause of the United States Constitution.

## LIST OF ALL PARTIES TO PROCEEDINGS

The list provided by petitioner should be supplemented to clarify that the interests of the State of New Jersey, Department of Environmental Protection and its Commissioner, Robert E. Hughey, as well as the position taken by said parties in the courts below, are clearly contrary to that of petitioner and, therefore, said parties should be regarded as respondents in the within action.

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## JURISDICTIONAL COUNTER-STATEMENT

An order for preliminary injunction was entered by the Superior Court of New Jersey, Law Division, on November 13, 1984. Petitioner City of Philadelphia was granted leave to take an interlocutory appeal and the preliminary injunction was affirmed by the Superior Court of New Jersey, Appellate Division, on February 15, 1985. Leave for further interlocutory appeal was granted by the Supreme Court of New Jersey which, on July 10, 1985, affirmed the decision of the Appellate Division. The case is presently scheduled for a trial on the merits to commence January 14, 1986, at which petitioner's constitutional claims will be further litigated and finally resolved. Since the case involves an interlocutory order and there has been no final judgment by the state courts, the Supreme Court lacks jurisdiction. 28 *U.S.C.* §1257(3).

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## COUNTER-STATEMENT OF THE CASE

On July 10, 1985, the Supreme Court of New Jersey rendered a decision on an interlocutory appeal upholding a preliminary injunction which seeks to avert an imminent public health crisis in certain New Jersey municipalities by regulating waste flows to a landfill which has virtually exhausted its useful life. The preliminary injunction bars from disposal at the landfill wastes generated in certain municipalities both within and without New Jersey which have alternative facilities available, while permitting municipalities which lack alternatives to continue using the landfill on a temporary, conditional basis. The case is presently scheduled for trial on January 14, 1986.

Kinsley Landfill, Inc., (Kinsley) is a privately owned landfill subject to regulation by the New Jersey Department of Environmental Protection (DEP) as to environmental concerns and by the Board of Public Utility Commissioners (BPU) as to economic matters. For approximately 25 years, Kinsley has operated as a major solid waste disposal facility in southern New Jersey. Its most recent permit, issued by DEP on September 26, 1980, authorized the landfill to dispose of solid waste to a height of 164 feet. On October 11, 1984, Kinsley notified its customers that because it was about to reach this permitted capacity it would close on October 28, 1984. Shortly thereafter, the Borough of Glassboro (Glassboro), one of the municipalities disposing of solid waste at the landfill, instituted an action in the Superior Court of New Jersey, Law Division, seeking to enjoin both the closure of the landfill and the use of the landfill for disposal of solid waste originating in petitioner City of Philadelphia. The defendants included Philadelphia, Gloucester County, and DEP. Various other parties were joined or have intervened in the proceedings.

The trial court conducted hearings over several days on Glassboro's request for a temporary restraining order. On October 26, 1984, two days before the scheduled closure of the landfill, the court issued a restraining order. The court found that Kinsley was rapidly approaching the end of its useful life and that it should be closed. Although the court found that continued use of the landfill beyond the permitted design capacity threatened the health and safety of the citizens of the municipality in which the landfill is located, Deptford Township, the court found that immediate closure would cause irreparable harm to the citizens of

Glassboro and certain other municipalities because they lacked alternative disposal sites. The court thus determined to temporarily restrain the landfill from closing and ordered Gloucester county to establish "a reasonable site for alternative solid waste disposal." The Court reserved decision on the application for restraints against petitioner (Pet. App. 4a-7a).

In accordance with a suggestion made by Kinsley's engineer, the trial court ordered Kinsley to submit to DEP engineering designs for an additional lift which would expand the height of the landfill by 16 feet. As ordered by the court, DEP reviewed these plans and submitted a report to the court for consideration in connection with the application for a preliminary injunction.

The report cited, among other things, the lack of an alternate disposal facility in New Jersey for the waste dumped at Kinsley. Consequently, the Counties of Gloucester, Camden and Salem (the three counties or the tri-county area), which account for most of the New Jersey generated waste deposited at the landfill, should expeditiously site and implement alternative landfills. Although established DEP procedures for opening a landfill ordinarily take at least two years, DEP would process the applications on an emergent basis, so that the counties might endeavor to implement alternate facilities within approximately one year. In the interim, the report concluded Kinsley could safely accommodate the limited, sixteen foot vertical expansion.

At the hearing on the preliminary injunction application, the trial court accepted the DEP report in its entirety and, consistent with that report, made certain findings. First, the trial court found that at then current

levels of waste disposal at Kinsley, the additional capacity created by the one lift expansion would be reached in approximately 3½ months. Most of the solid waste then dumped at the landfill emanated from Pennsylvania, with virtually all of that waste coming from petitioner. For example, petitioner provided 53.9% of the 4,738,783 cubic yards of waste dumped at the landfill during the period of July 1, 1983 through May 31, 1984. According to waste flow registration statements which petitioner filed with DEP, this volume represents a dramatic increase over petitioner's prior use of the landfill. For example, in 1981 to 1982 petitioner disposed of 784,770 cubic yards at the facility, and, in 1982 to 1983 this figure had grown to 1,136,785 cubic yards. While the tri-county area accounted for most of the waste emanating from New Jersey which was dumped at Kinsley, approximately 6.1% of the waste came from 13 other New Jersey counties (Pet. App. 28a).

In an effort to conserve the capacity of the landfill, DEP had, since 1980, required petitioner as well as the affected New Jersey counties, to sign an interdistrict waste flow agreement with Gloucester County as a condition of continued use of the Kinsley landfill. Notwithstanding DEP's urging, petitioner had not executed such an agreement, the basic instrument under New Jersey law for planning and managing the disposal of solid waste generated outside a district such as Gloucester County. The trial court found that Gloucester County had negotiated with petitioner in good faith in an effort to reach accord on an interdistrict wasteflow agreement, but notwithstanding Gloucester's effort no accord was reached. As a result, petitioner failed to share in efforts to conserve space at the landfill by restricting all waste flows to the facility, an es-

sential component of waste flow agreements. Accordingly, the court found that the disposal of waste by petitioner at the landfill had "continued to escalate at an alarming rate unlike those districts subject to interdistrict agreements." (Pet. App. 10a).

Also consistent with the DEP report, the trial court found that petitioner, unlike the municipalities in the tri-county area, could accommodate the closure of the Kinsley landfill, as petitioner's own Commissioner of Streets had testified. Even when Kinsley was operating under a DEP permit, petitioner sent half of its garbage elsewhere. Petitioner not only enjoys access to alternative sites, but also has the equipment and material for routing its solid waste elsewhere. In contrast, affected municipalities in the tri-county area had no alternative to Kinsley. Unlike petitioner, they lacked the trucks, transfer stations, equipment and other resources necessary to dispose of their waste at more distant sites. The court thus determined that 59 municipalities in the tri-county area had no alternative to Kinsley and, if the landfill were closed precipitously, they could not provide for waste disposal, creating a public health crisis (Pet. App. 8a-11a; 40a-43a). Finally, consistent with the DEP report, the trial court found that the municipalities in the tri-state area should implement vigorous recycling programs in order to reduce waste flows (Pet. App. 13a).

In view of these findings, the trial court decided that the most equitable result was to exclude from Kinsley the solid waste originating in Philadelphia and from other municipalities, both within and without New Jersey, which had alternative disposal sites available to them. In addition, the municipalities in the tri-county area which continued to use Kinsley would be required to implement man-

datory recycling programs. The result of the decision was to extend the life of the landfill for approximately one year, the estimated time necessary for the three counties to implement alternative sites.

Consequently, on November 13, 1984, the trial court entered an order for preliminary injunction, ordering, among other things that: 1) the counties of Camden, Gloucester, and Salem develop new landfills to become operational within twelve months in accordance with a specific schedule; 2) Kinsley Landfill cease accepting by November 27, 1984 all solid waste generated outside of the Gloucester County solid waste management district, from both within and without New Jersey, which is not subject to interdistrict waste flow agreements, including waste generated within Philadelphia; 3) all municipalities in Gloucester, Camden and Salem Counties which utilize the Kinsley Landfill must, by November 27, 1984, maximize recycling efforts including curb side pickup of recyclables and mandatory recycling ordinances; 4) a minimal vertical expansion of the Kinsley Landfill for a single additional lift of compacted solid waste would be implemented in order to provide certain communities in the tri-county area which lacked alternatives to Kinsley with waste disposal facilities until alternatives were developed; 5) Kinsley was to be closed for all sludge disposal on March 15, 1985.*

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* While there were subsequent orders of the trial court clarifying the preliminary injunction with respect to sludge disposal, including that order reproduced in petitioner's appendix at 123a, effective March 15, 1985 Kinsley was closed for all sludge disposal as ordered by the trial court. This includes sludge generated in the tri-county area. As a result, the amount of waste generated in New Jersey which is presently barred from Kinsley as a result of the preliminary injunction is even greater than the quantity set forth in the decision of the Supreme Court of New Jersey.

The injunction also provided that any party could move on one-day notice for dissolution or modification (Pet. App. 12a-14a).

In reaching this decision, the trial court considered and rejected petitioner's Commerce Clause arguments. The court found that the order was consistent with the decision of this Court in *Philadelphia v. New Jersey*, 437 *U.S.* 617 (1978), given petitioner's failure to cooperate in efforts to control and manage all waste flows into the Kinsley landfill through interdistrict agreements, and the phenomenal increase in waste flows to Kinsley's from petitioner during the preceding few years unlike waste flows from communities governed by interdistrict agreements (Pet. App. 94a-99a). The court also determined that its order was a legitimate exercise of the police power given petitioner's admitted ability to accommodate the closure of the landfill, whereas the communities in the tri-county area could not and would face an imminent health hazard the landfill closed before alternatives were developed (Pet. App. 99a-100a).

On November 15, 1984 and again on November 21, 1984, petitioner moved before the trial court seeking reconsideration of the November 13, 1984 order, and also asked the court to authorize a further vertical expansion of the landfill for a second 16 foot lift to accept waste flows from Philadelphia at reduced levels. While petitioner submitted expert testimony in support of its contention that such a further vertical expansion of the facility would be environmentally safe, the trial court found the testimony of a witness presented by DEP to be more credible and denied petitioner's motions (Pet. App. 194a-195a).

Petitioner was granted leave to take an interlocutory appeal to the Appellate Division of Superior Court and, on February 15, 1985, the Appellate Division rendered a decision affirming the preliminary injunction. The Appellate Division found the trial court's factual findings to be supported by the evidence (Pet. App. 54a). The court concluded that the case presented an "imminent public health crisis" affecting the tri-county area (Pet. App. 63a), and that this emergency differed from "the everyday, business-as-usual commerce between the several states envisioned by *Philadelphia v. New Jersey*, 437 *U.S.* 617 (1978)." (Pet. App. 63a). The court found that the particular facts of this case presented an emergent public health crisis "probably more compelling and dangerous than the local burdens on commerce historically tolerated, as shown by the 'quarantine' cases." Thus, the trial court's order was not concerned with economic protectionism, but with "imminent considerations of public health and safety" (Pet. App. 63a-64a).

Additionally, based on the record before it the court determined that the burdens on interstate commerce were not excessive in light of the substantial state interest in resolving a public health crisis (Pet. App. 68a-69a). Rather, the Appellate Division concluded that given the "veritable doomsday" crisis affecting the tri-county area, an injunction which bars from Kinsley both in-state and out-of-state users from outside the tri-county area affected by the emergency for a limited period of time (amounting to only 3% of the temporal life of the landfill) strikes the right balance and is respectful of the "sanctity of our Union and the federal system, as well as for local concerns." (Pet. App. 77a-78a).

The Supreme Court of New Jersey granted petitioner's motion for leave to take an interlocutory appeal and, on July 10, 1985, rendered a decision affirming the judgment of the Appellate Division. *Glassboro v. Gloucester County Board of Chosen Freeholders,* 100 *N.J.* 134, 495 *A.*2d 149 (1985) (Pet. App. 1a-48a). The Supreme Court of New Jersey first determined which of two standards was applicable to its analysis of petitioner's Commerce Clause claims. The first standard, which applies when a state regulation manifests simple economic protectionism, results in a virtual *per se* rule of invalidity (Pet. App. 20a). See *Philadelphia v. New Jersey, supra,* 437 *U.S.* at 624. The court stated that "a second, more flexible, standard applies when a state regulation advances legitimate local interests and does not facially discriminate against interstate commerce," citing *Pike v. Bruce Church, Inc.* 397 *U.S.* 137, 142 (1970) (Pet. App. 22a).

The court contrasted the narrowly tailored preliminary injunction at issue herein, which bars Philadelphia-generated waste from a single landfill in New Jersey and for a limited period of time in response to an immediate public health crisis, with the blanket ban excluding virtually all out-of-state waste which had been held invalid in *Philadelphia v. New Jersey, supra* (Pet. App. 26a). The court determined that the primary purpose and effect of the preliminary injunction is to avoid a public health crisis in those communities which lack alternative waste disposal options, and that the injunction is not an economic protectionist measure. Thus, the court held that the injunction operated in an evenhanded manner, restricting waste flows from those communities with alternatives to the Kinsley landfill to the extent necessary in order to protect other communities which need time to develop such alternatives.

> [S]everal reasons compel the conclusion that the place of origin is unrelated to the injunction against the continued dumping of Philadelphia garbage at Kinsley. . . Thirteen New Jersey counties, which account for approximately 6.1% of the waste disposed of at Kinsley, are also excluded. . . . If no state line existed between New Jersey and Pennsylvania, we would uphold the injunction as a valid exercise of the powers of a court of equity. As an equitable remedy, the decree preserves space at Kinsley for certain municipalities that, as a practical matter, do not have access to other landfills, while remitting other municipalities, including Philadelphia, to alternative sites. . . . The mere fact that Philadelphia is in another state should not imbue it with greater rights than it would possess if it were located in New Jersey. The Commerce Clause was intended as a shield against discrimination, not as a sword to obtain a preference. We conclude that the injunction is not discriminatory in purpose or effect. It is plainly not a mere protectionist measure, and, therefore, does not constitute a *per se* violation of the Commerce Clause [Pet. App. 27a-29a].

Accordingly, the court proceeded to apply the more flexible standard set forth in *Pike v. Bruce Church, Inc., supra,* 397 *U.S.* at 142, and proceeded to balance the local benefits with the burdens on interstate commerce. The court easily determined that abating a public health emergency in the tri-county area is a legitimate local concern, as are New Jersey's efforts to plan for the disposal of solid waste through interdistrict agreements. In this regard, the court emphasized New Jersey's own efforts to conserve its landfill space, noting that at "Kinsley, the availability of the additional lift is not the result of happenstance, but of New Jersey's conservation efforts." (Pet. App. 38a). The court determined that New Jersey used interdistrict agreements as a key component of its solid

waste management efforts (Pet. App. 38a). Yet, petitioner failed to cooperate.

> Significantly, the trial court found that the solid waste generated by Camden and Salem counties, which executed such agreements, remained constant. In contrast, Philadelphia, which did not sign an interdistrict agreement, tripled the amount of garbage it dumped at Kinsley from 1981 to 1984 [Pet. App. 39a].

The Supreme Court of New Jersey also emphasized that "[w]ere it not for the injunction . . . the landfill would be closed not only to former customers outside the tri-county area, such as Philadelphia, but also to those within the three counties." The injunction was entered in order to keep the landfill open long enough to avoid a waste disposal catastrophe and resultant public health crisis in the tri-county area. "So considered, the effect of the injunction on interstate commerce is incidental." (Pet. App. 40a).

The court also held that even if the effect could be characterized as more than incidental, the burden falling on Philadelphia would not be clearly excessive, contrasting Philadelphia's lost access to the exhausted landfill with the "disastrous results that its continued use would visit on the tri-county municipalities." (Pet. App. 40a-41a). The court found that the economic effect on Philadelphia, a city of approximately 1.7 million people, would be to increase its annual waste disposal costs by 5 percent for the first year following Kinsley's closure and 2 percent thereafter. In contrast, the solid waste disposal budget of Glassboro, a municipality of some 14,500 people, would escalate from $100,000 to a million dollars per year, and the cost to Camden County, which has a population of approximately 500,000 people could increase annually from

3 million dollars to 12 million dollars. The court further emphasized, however, that the closure of Kinsley's involves far more than mere economic considerations. The court noted that many of the municipalities in the tri-county area literally had no alternative to Kinsley given their lack of access to alternative sites and their lack of the trucks, equipment, and transfer stations needed to utilize more distant sites. Thus, if the landfill were closed precipitously, waste would remain uncollected on the streets of these towns. Given these facts, the court concluded that the burden on Philadelphia is not excessive (Pet. App. 41a-43a).

Finally, the court determined that the record established that the local interests could not be achieved as well with a lesser impact on interstate commerce. The court determined that a plan which afforded Philadelphia access to the landfill, even if proportionately reduced, "would not merely be a less effective means of obtaining time for the development of alternative sites, it would be ineffective." The threat to local health could not be averted by a less restrictive injunction (Pet. App. 46a). In addition, the court accepted the credibility findings upon which the trial court based its decision to deny Philadelphia's motion to expand the landfill by a second additional lift.

Today, the preliminary injunction remains in effect pending a final determination of all issues at a plenary trial to commence on January 14, 1986. Many issues remain to be tried including a claim that the Kinsley landfill can safely expand and continue operating for an additional ten years. Petitioner has also indicated its intention to produce evidence at trial in support of its Commerce Clause claims (Resp. App. 1a-4a) and these federal issues will be fully litigated and will be finally determined after the trial on the merits.

## ARGUMENT

### A. THE SUPREME COURT LACKS JURISDICTION TO GRANT THE WRIT OF CERTIORARI BECAUSE THERE HAS BEEN NO FINAL JUDGMENT BY THE STATE COURTS.

It is fundamental that the jurisdiction of the Supreme Court to review State court determinations is limited to final judgments. 28 *U.S.C.* § 1257; *Costarelli v. Massachusetts,* 421 *U.S.* 193, 195, n.3 (1975). This Court has said that to satisfy the "finality" requirement, an order of a state court

> must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.

*Market Street Railway Company v. Railroad Commissioner,* 324 U.S. 548, 551 (1945). See also *Rosenblatt v. American Cyanamid Company,* 86 S.Ct. 1, 15 *L.Ed.*2d 39 (1965) (Opinion in Chambers). This requires a decision which is final as to all parties and all issues, final "as to the whole subject-matter and as to all the causes of action involved." *Collins v. Miller,* 252 *U.S.* 364, 370 (1920) see also *Republic Natural Gas Co. v. Oklahoma,* 334 *U.S.* 62, 68 (1948). The finality requirement is designed to avoid the evils of piecemeal review and is founded upon considerations generally applicable to sound judicial administration. *Chapman v. California,* 405 *U.S.* 1020 (1972); *Radio Station WOW, Inc. v. Johnson,* 326 *U.S.* 120, 124 (1945).

In the instant case, a state trial court has entered an order for preliminary injunction and, while the Supreme

Court of New Jersey has allowed petitioner to take an interlocutory appeal and has upheld the preliminary injunction, the case is pending in the trial court where it is scheduled to go to trial on January 14, 1986. Petitioner has indicated its intention to offer additional evidence at trial relative to its Commerce Clause claims (Resp. App. 1a-4a), and these issues will be litigated and finally resolved at trial. Accordingly, the decision of the Supreme Court of New Jersey is but an intermediate step in the ongoing state court proceedings, and there has been no final word by the New Jersey courts on petitioner's Commerce Clause claims. Accordingly, the threshold requirement of finality has not been met.

Of course, this Court is willing to give the concept of finality a practical construction, *Local No. 438 Construction and General Laborers' Union v. Curry*, 371 *U.S.* 542 (1963), and, in certain narrowly defined situations, the Court may treat a matter as final notwithstanding continuing state court proceedings. A definitive statement of the types of cases where the Court has found finality despite ongoing state court proceedings is contained in the Court's opinion in *Cox Broadcasting Corp. v. Cohn*, 420 *U.S.* 469, 479-485 (1975).

The first such situation arises when "for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained. In these circumstances, because the case is for all practical purposes concluded, the judgment of the State court on the federal issue is deemed final." *Cox, supra*, 420 *U.S.* at 479. See, *e.g., Local No. 438 Construction and General Laborers' Union v. Curry, supra*, (where the state court had already decided the merits of the case in connection with a temporary injunction and petitioner had no other defense to

offer with respect to the permanent injunction, the state court decision was a final disposition as a practical matter); *Richfield Oil Corp. v. State Board of Equalization,* 329 *U.S.* 69 (1946) (stipulated facts which preordain outcome of additional state court proceedings render initial state court decision final for purposes of Supreme Court review).

The instant case, however, stands in sharp contrast to the cases cited above. In the instant case, a plenary trial will soon be held at which time the trial court will finally resolve petitioner's federal claims. These claims are inextricably intertwined with the complex factual web which will be untangled at the trial on the merits. For example, petitioner has stated that it will try to prove at trial that the injury which it is suffering as a result of the preliminary injunction is not as insignificant as appeared at the preliminary injunction hearing, and that the municipalities in the tri-county area will not suffer any greater injury if denied access to Kinsley than that suffered by petitioner (Resp. App. 1a-4a). In addition, another party asserts that the Kinsley landfill may safely expand and must be permitted to continue operating for another 10 years. Obviously, the final resolution of these factual issues at trial could effect the factual underpinnings of the State courts' preliminary determination of petitioner's Commerce Clause claims, and the trial court may well decide to dissolve the restraints and allow petitioner to resume dumping at Kinsley. Since the decision of the Supreme Court of New Jersey does not preordain the outcome of the upcoming trial, it is clear that the finality requirement has not been satisfied in the present case. *Cox, supra,* 420 *U.S.* at 479.

The second situation outlined by this Court in which Supreme Court review may be allowed despite ongoing State court proceedings arises in cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future State court proceedings." *Cox, supra,* 420 *U.S.* at 480. See *Radio Station WOW, Inc. v. Johnson, supra,* 326 *U.S.* at 124-127 (subsequent accounting could not affect decision on federal issue regarding possession of property); *Brady v. Maryland,* 373 *U.S.* 83, 85, n.1 (1963) (subsequent determination of ultimate sentence issued cannot affect the determination that the appellant was properly convicted); *New York v. Cathedral Academy,* 434 *U.S.* 125 (1977) (subsequent determination of the amount due under a statute cannot affect the determination that the statute is constitutional). This siuation is also inapplicable to the present case because, as set forth above, the outcome of the factual issues to be determined at the plenary trial might well affect the determination of petitioner's Commerce Clause claims. For example, if the landfill closes on or near schedule, and accepts no waste from any source, petitioner's claims become moot. Similarly, if the landfill expands and continues operating for an additional 10 years, the imminent health crisis in the tri-county area, which underlies the state courts' preliminary determination of petitioner's Commerce Clause claims, would no longer exist.

Cases "where the federal claim has been finally decided, with further proceedings on the merits in the State courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case . . .," gives rise to a third situation in which this Court

may find finality for purposes of its review notwithstanding continuing state court proceedings. *Cox, supra,* 420 *U.S.* at 481. Such a situation existed in *California v. Stewart,* 384 *U.S.* 436, 498, n. 71 (1966) (decided with *Miranda v. Arizona*). In that case, a state appellate court reversed a criminal conviction on constitutional grounds. Thus, if the state prevailed at a new trial the state's constitutional argument would be rendered moot and, if the defendant were acquitted at the new trial, the state would be precluded from further appealing the case. Clearly such is not the situation in the instant case. As set forth above, the trial court will be conducting a plenary trial on the factual issues which may be dispositive of petitioner's federal claims. Unlike the situation in *California v. Stewart, supra,* in the event petitioner does not prevail at trial, issues such as double jeopardy will not preclude petitioner from presenting its federal claims for review after a final judgment by the state courts.

Finally, Supreme Court review has been allowed notwithstanding ongoing state court proceedings in a line of cases where the party seeking review might prevail in the state courts on nonfederal grounds, rendering later review of the federal issue unnecessary, but the judgment is nevertheless deemed final because a refusal of immediate review might seriously erode an important federal policy. *Cox, supra,* at 482-483. See *Local No. 438 Construction and General Laborers' Union v. Curry, supra; Nebraska Press Association v. Stuart,* 423 *U.S.* 1327 (1975); *National Socialist Party v. Skokie,* 432 *U.S.* 43 (1977). Yet, as set forth below, it is clear that the present matter is not such an extraordinary case.

*Local No. 438, supra,* involved an action by an employer to enjoin a labor union from picketing, in which the union

claimed its activities were within the exclusive jurisdiction of the National Labor Relations Board. The Supreme Court of Georgia, reversing a lower court, ordered that a preliminary injunction issue. This Court held that the issue before its was not the legality of the picketing but "whether the Georgia courts had power to proceed with and determine this controversy." 371 *U.S.* at 458. Since the State court had "finally and erroneously" resolved this jurisdictional issue, *ibid,* this Court concluded that the finality requirement of 28 *U.S.C.* § 1257 had been met. In so ruling, the Court emphasized that if the issue were "whether a [state] court has erroneously decided a matter of federal law in a case admittedly within its jurisdiction," the case would not be ripe for Supreme Court review. 371 *U.S.* at 458. Since the precise issue in the present case is whether in issuing a preliminary injunction the New Jersey courts have erroneously decided a matter of federal law in a case admittedly within their jurisdiction, it is obvious that *Local No. 438* is inapplicable.

*Nebraska Press Association v. Stuart, supra,* and *National Socialist Party v. Skokie, supra,* are inapposite since both are clearly "center[ed] upon cherished First and Fourteenth Amendment values." *Nebraska Press Association, supra,* 423 *U.S.* at 1327; *see National Socialist Party v. Skokie, supra,* 432 *U.S.* at 44. Both cases involved instances of prior restraint on the exercise of First Amendment rights, situations which always bear "'a heavy presumption against [their] constitutional validity.'" *Id.* at 1328, quoting *New York Times Co. v. United States,* 403 *U.S.* 713, 714 (1971); *see National Socialist Party v. Skokie, supra,* 432 *U.S.* at 44. In holding that the imposition of prior restraints by the State courts involve

rights "separable from, and collateral to" the the merits, *ibid,* quoting *Cohen v. Beneficial Industrial Loan Corp.,* 337 *U.S.* 541, 546 (1949), this Court made clear that the *Skokie* and *Nebraska Press* decisions are themselves clearly inseparable from cherished First Amendment values and the inherent repugnancy of prior restraints to such values. 432 *U.S.* at 44; 423 *U.S.* at 1329-1330. The instant case, however, in no way involves prior restraint or First Amendment issues and, therefore, this case does not present the extraordinary circumstances present in the cases cited above.

Thus it is clear that the present case does not involve a situation in which Supreme Court review may be had notwithstanding ongoing state court proceedings. There has been no final determination of the litigation nor has there been a final resolution of petitioner's Commerce Clause claims. All that has been decided is that the preliminary injunction will remain in effect pending final resolution of all issues, including petitioner's Commerce Clause claims, at a plenary trial. If such a preliminary injunction constitutes a final judgment within the meaning of 28 *U.S.C.* § 1257, it is difficult to see how this case could be distinguished from the many other cases arising each year in the state courts where there has been an interlocutory order notwithstanding allegations of infringement of various constitutional rights. Quite clearly the intervention of this Court in the present case would run counter to the basic principles of sound judicial administration and would involve the evils of piecemeal review sought to be avoided by the finality requirements of 28 *U.S.C.* § 1257.

In sum, the writ sought should be denied because there has been no final judgment of the highest court of the state and thus, this Court lacks jurisdiction to grant the writ.

## B. THE COURTS BELOW PROPERLY HELD THAT THE PRELIMINARY INJUNCTION DOES NOT VIOLATE THE COMMERCE CLAUSE BECAUSE IT IS BASED UPON AN EVENHANDED EQUITABLE SCHEME WHICH EFFECTUATES LEGITIMATE LOCAL PUBLIC INTERESTS WITH ONLY INCIDENTAL EFFECTS ON INTERSTATE COMMERCE.

Petitioner argues that the November 13, 1984 order of the trial court imposes an impermissible burden upon interstate commerce in violation of the Commerce Clause of the United States Constitution, Article I, § 8, cl.3. While the Constitution gives Congress the power to regulate commerce among the states, many subjects of potential federal regulation under that power inevitably escape Congressional attention "because of their local character and their number and diversity." *South Carolina v. Barnwell Brothers*, 303 *U.S.* 177, 185, rehearing denied 303 *U.S.* 667 (1938). *Philadelphia v. New Jersey, supra.* In the absence of federal legislation, these subjects are open to control by the states so long as they act within the restraints imposed by the Commerce Clause itself. *See Raymond Motor Transportation, Inc. v. Rice*, 434 *U.S.* 429 (1978). One such area in which the states have retained significant power to regulate is that of environmental protection and resource conservation. *Minnesota v. Clover Leaf Creamery Co.*, 449 *U.S.* 456, rehearing denied 450 *U.S.* 1027 (1981); *Philadelphia v. New Jersey, supra.* Moreover, when a state is faced with an imminent public health and welfare crisis, this Court has historically tolerated local burdens on interstate commerce. *See Asbell v. Kansas*, 209 *U.S.* 251 (1908); *Reid v. Colorado*, 187 *U.S.* 137 (1902); *Baldwin v. G.A.F. Sellig, Inc.*, 294 *U.S.* 511 (1935); *Bow-*

*man v. Chicago & Northwestern Railway Co.*, 125 *U.S.* 465 (1888).

Decisions of the Supreme Court which define the limitations imposed by the Commerce Clause have attempted to reconcile the conflict between state regulations designed to further legitimate local interests, such as the sound disposal of solid waste, and the unavoidable burden which such regulation may have upon interstate commerce. *Sphorhase v. Nebraska ex rel. Douglas*, 458 *U.S.* 941, 956-957 (1982); *Philadelphia v. New Jersey, supra*, 437 *U.S.* at 623-624. If the state regulation purporting to promote environmental purposes is in reality "simply economic protectionism," the Supreme Court has applied a "virtual *per se* rule of invalidity." *Minnesota v. Clover Leaf Creamery Co., supra*, 449 *U.S.* at 471; *Philadelphia v. New Jersey, supra.*

However, where valid local interests are advanced and there is not patent discrimination against interstate trade, the Court has adopted a more flexible standard, stated in *Pike v. Bruce Church, Inc.*, 397 *U.S.* 137, 142 (1970), as follows:

> where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . If a legitimate purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

*See also, Minnesota v. Clover Leaf Creamery, Co., supra,* 449 *U.S.* at 471; *Philadelphia v. New Jersey, supra,* 437 *U.S.* at 624.

Thus, the Commerce Clause test is to determine whether a) the challenged state regulation is patently discriminatory, and, if not b) whether it effectuates legitimate local purposes, and c) whether the incidental burden on interstate commerce is excessive in relation to the local interest served. *Pike v. Bruce Church, Inc., supra; Philadelphia v. New Jersey, supra.*

Petitioner's reliance on *Philadelphia v. New Jersey, supra,* is misplaced. In that case the Supreme Court held invalid a New Jersey statute which imposed a total and absolute ban on the disposal in New Jersey of virtually all solid waste generated outside of the State solely because of its origin. This Court held at 437 *U.S.* at 626-628,

> But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside of the state *unless there is some reason apart from their origin, to treat them differently* . . . .
>
> The New Jersey law at issue in this case falls squarely within the area that the Commerce Clause puts off limits to state regulation. On its face, it imposes on out-of-state commercial interests the *full burden* of conserving the State's remaining landfill space. [Emphasis added].

In the instant case, however, the trial court faced an immediate crisis and determined that extraordinary, emergent, equitable relief was necessary in order to avoid dire consequences. The court responded by balancing the equities, entering a preliminary injunction based upon evenhanded considerations, an injunction which is necessary to effectu-

ate a legitimate local interest and which poses only incidental and *de minimis* burdens on interstate commerce.

There is no lawful disposal capacity remaining at the Kinsley Landfill. The landfill has reached its authorized limits; there is no more room. Under these circumstances, the New Jersey courts have held that if there is continued use of the landfill beyond its useful life people residing near the facility will be seriously and deleteriously affected. (Pet. App. 6a). The preliminary injunction thus ordered the three counties to implement new, alternative landfills on an unprecedented accelerated schedule. Yet, the New Jersey courts have also held that until these alternative facilities are established, the municipalities in these counties have no alternative to Kinsley for disposal of their waste and would thus face a public health emergency if the landfill is closed before these alternatives become available. Petitioner, however, would suffer no comparable injury if the landfill were closed. Uncollected waste would not sit on the streets of Philadelphia because there are alternative sites available to it, and petitioner has the equipment, material and resources to transport waste to these sites, unlike the municipalities in the tri-county area (Pet. App. 10a-11a; 40a-43a; 59a; 63a-64a). Moreover, the court found that while a little more life could be squeezed out of the landfill and that one more lift could be added consistent with minimal environmental standards, if this small remaining safe disposal capacity is to be effective in easing the waste disposal emergency in the tri-county area by lasting until the alternatives become operational, waste flows to Kinsley must be substantially reduced.

Given these facts, the trial court's response was not an across-the-board ban on disposal anywhere in New Jersey

of virtually all waste generated outside of the State. Rather, the court carefully crafted a limited remedy, restricting access to a single landfill and for a limited time period by barring both in-state and out-of-state waste from outside the area affected by the emergency. Further, the court did not merely transfer a problem across state lines, but averted a local emergency by restricting waste from communities such as petitioner, which admittedly could, and in fact have, accommodated the restriction without adverse public health consequences. The contest was between petitioner, a generator of waste which conceded it had alternatives (albeit slightly more expensive) available to accommodate its waste flow, and certain New Jersey generators without alternatives or indeed time to develop same if they were deprived of what limited life remained at Kinsley.

Thus, the injunction is not mere economic protectionism. Rather, as stated by the Supreme Court of New Jersey, the injunction simply "treats Philadelphia like the thirteen New Jersey counties that formerly used Kinsley." (Pet. App. 25a).

> If no state line existed between New Jersey and Pennsylvania, we would uphold the injunction as a valid exercise of the powers of a court of equity. . . . The mere fact that Philadelphia is in another state should not imbue it with greater rights than it would possess if it were located in New Jersey. The Commerce Clause was intended as a shield against discrimination, not as a sword to obtain a preference [Pet. App. 28a-29a].

Thus, *Philadelphia v. New Jersey, supra,* is not only distinguishable from the instant case but, it is totally distinct, and petitioner's reliance on that precedent is devoid of merit.

Indeed, the imminent public health emergency present in the instant case presents a situation more compelling and dangerous than that presented in other cases, such as the "quarantine" cases, where local burdens on commerce historically have been tolerated. *See Asbell v. Kansas, supra; Reid v. Colorado, supra; Baldwin v. G.A.F. Sellig, Inc., supra; Bowman v. Chicago & Northwestern Railway Co., supra.* The decision of the Supreme Court of New Jersey represents not the "flaunting" of the dictates of this Court, but an affirmation of this Court's determination that the preservation of a vital resource in times of severe shortage for the purpose of protecting the health of their citizens is at the core of the states' police power and, thus, such health and safety regulation, as opposed to economic protectionism, can withstand constitutional scrutiny. *Sporhase v. Nebraska ex rel. Douglas, supra.*

In sum, it is clear that the preliminary injunction is not mere economic protectionism, but is based upon neutral criteria which are not patently discriminatory against interstate commerce because the purpose and effect of the order is to regulate the waste flow to Kinsley not simply as a result of the state of origin of the waste, but, rather, based upon whether or not a community, wherever located, will face a public health crisis if its access to Kinsley were immediately terminated.

In addition, it is submitted that it cannot be seriously disputed that the order of the trial court serves legitimate local interests. Clearly, the State of New Jersey has an interest in averting a public health emergency within the tri-county area. Similarly, the state has an inter-

est in managing and conserving its waste disposal capacity through regional planning and coordination of solid waste disposal including interdistrict agreements. Indeed, Congress itself has recognized the need for the development of comprehensive state plans for solid waste disposal and, implicitly, this requires the planned management of waste flows. In enacting the Resource Conservation and Recovery Act of 1976, 42 *U.S.C.A.* §§ 66901-6987, Congress has expressed a strong policy preference for resource recovery. *See* 42 *U.S.C.A.* § 6941. Resource recovery cannot be accomplished if waste streams are not directed. *See Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency,* 715 *F.*2d 419 (8th Cir. 1983) (restraint on waste flows essential to development of comprehensive waste flow plan). The preliminary injunction in the instant case recognizes local responsibilities in this area, responsibilities that clearly require integrated planning.

Petitioner, however, has failed to cooperate in New Jersey's efforts to manage and conserve its waste disposal capacity by restricting the flow of all waste into the Kinsley Landfill, an approach which this Court has endorsed. *See Philadelphia v. New Jersey, supra,* 437 *U.S.* at 626. Rather, as found by the courts below, while waste flows from petitioner increased threefold, waste flows from Camden and Gloucester counties, which did sign interdistrict agreements, remained constant (Pet. App. 9a; 39a). Had petitioner joined in these efforts to control all waste flows to Kinsley, the capacity of the landfill would not be exhausted, the present crisis in the tri-county area would not exist, and sufficient capacity would exist at the landfill to accommodate waste flows from petitioner and the other communities as well.

Further, as set forth above, it is clear that the burden on interstate commerce is not excessive in relation to the local interest served. Philadelphia can accommodate the closure of the landfill, albeit at slightly higher costs for waste disposal, ranging from 2% to 5%. Municipalities in the tri-county area lack feasible alternatives to Kinsley, and lack the trucks, equipment, transfer stations, material and resources to transport their wastes to more distant locations (Pet. App. 40a-43a).

Finally, the Supreme Court of New Jersey properly determined that New Jersey's legitimate local interests could not be promoted in a manner which has a lesser impact on interstate commerce. In this regard, Philadelphia argues that all former users should be allowed continued access at proportionately reduced levels. Yet what this argument ignores is the very factual basis upon which the injunction is based. Were it not for the emergent need of municipalities in the tri-county area, Kinsley would be closed to all users. In order to avert a public health crisis in Southern New Jersey, Kinsley has been kept open to give those municipalities which lack alternative waste disposal options time to develop such alternatives. Yet, a plan that afforded petitioner access, even if proportionately reduced, would foreshorten the life of the landfill and merely delay the public health crisis for a few months. Thus, as stated by the Supreme Court of New Jersey:

> Such a plan would not merely be a less effective means of obtaining time for the development of an alternative site; it would be ineffective. See ***Minnesota v. Clover Leaf Creamery Co., supra.*** . . . So viewed, Philadelphia's demand that the tri-county municipalities incur substantial costs for a short-term solution is not so much a request for a less discriminatory al-

ternative as it is an attempt to place an excessive burden on those municipalities. The ideal is even-handedness. *Sporhase v. Nebraska, supra,* 458 *U.S.* at 956.

In sum, it is clear that the injunction is an evenhanded equitable remedy which is necessary to avoid a local public health emergency and which has only incidental and *de minimus* effects on interstate commerce.

## CONCLUSION

It is fundamental that this Court has jurisdiction to review only final judgments of state courts, *i.e.*, judgments which are final as an effective determination of the litigation and not merely an intermediate step therein. In the present case, while the Supreme Court of New Jersey has upheld a preliminary injunction on interlocutory appeal, that decision is but an intermediate step in ongoing litigation. A trial is scheduled for January 14, 1986 at which time petitioner and other parties will present evidence on a variety of factual issues which are inextricably intertwined with petitioner's federal claims. Since the threshold requirement of finality has not been met, the writ of certiorari should be denied.

In addition, it is clear that the preliminary injunction does not discriminate against interstate commerce. Rather, faced with an extraordinary public health emergency, the preliminary injunction represents a proper balance of the equities. It provides for an orderly closure of a landfill which is virtually exhausted by allowing its continued use on a temporary, conditional basis and until alternatives

can be implemented by those communities which would suffer irreparable injury if the landfill were precipitously closed, while excluding those communities able to accommodate the closing of the landfill with minimal inconvenience. Indeed, the facts of the last several months have demonstrated how easily petitioner can accommodate the closure of the landfill. In addition, petitioner's failure to accept an interdistrict waste flow agreement and consequent refusal to share equally with New Jersey communities in the efforts to restrain the flow of all waste to the Kinsley Landfill has itself contributed to the rapid exhaustion of capacity at the facility and helped precipitate the crisis which gives rise to the preliminary injunction. Thus, the injunction provides an evenhanded, nondiscriminatory regulatory approach, serving legitimate local interests, with nothing more than incidental effects on interstate commerce.

For the foregoing reasons, the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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DATED: November 4, 1985

**APPENDIX**

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
GLOUCESTER COUNTY

DOCKET NO. L-070476-84 P.W.

Civil Action

FACTUAL AND LEGAL CONTENTIONS

BOROUGH OF GLASSBORO, et al.,

Plaintiffs,

v.

GLOUCESTER COUNTY BOARD OF CHOSEN FREEHOLDERS, et al.,

Defendants.

I. Lack of Current Solid Waste Emergency:

Current waste flows into Kinsley from the tri-county generators permitted disposal access thereto are averaging between 5,000 and 6,000 cubic yards in truck per day. According to Kinsley's exeprt, the single vertical lift's remaining capacity as of July 11, 1985 was 1,290,000 cubic yards in truck and would last until approximately April 1986 before being fully used up at current flow levels. Camden County generators will stop using Kinsley for

solid waste disposal sometime prior to November 15, 1985 and possibly as early as late September 1985. Gloucester County will, by its own admission, have its County landfill in South Harrison Township operational by November 15, 1985. Other landfills in southern New Jersey, particularly in Atlantic and Cape May Counties have solid waste disposal capacity which could, with NJDEP and BPU cooperation, be utilized by tri-county generators in the event of any dislocation of their above-described waste management plans. Temporary solid waste collecting and hauling services are available to tri-county generators to replace or supplement their present arrangements in the event disposal outside of Gloucester County would become necessary. Kinsley wishes to commence closure procedures on November 15, 1985 or as soon thereafter as possible and requires the single lift to be filled to its design capacity in order to effect an environmentally-sound closure in accordance with NJDEP requirements. Tri-county waste flows will be reduced further if Camden County generators cease using Kinsley prior to November 15, 1985 and if both Camden County and Gloucester County generators cease same on November 15, 1985. Accordingly, the City of Philadelphia should be permitted to resume solid waste disposal at Kinsley in such volume as will ensure that Kinsley reaches capacity on November 15, 1985 or as soon thereafter as is feasible. The City may not, consistent with the Commerce Clause, continue to be excluded from Kinsley in the absence of any present solid waste emergency in the tri-county area as a basis for permanent injunctive relief.

II. Exclusion Because of a Lack of Interdistrict Waste Flow Agreement Would Be Improper:

The City will demonstrate that it was not at fault for the non-consummation of an interdistrict waste flow agreement with Gloucester County between the time it was first requested by NJDEP to enter into same and November 1984. Accordingly, there is no valid factual or legal basis for excluding the City from Kinsley by reason of the absence of such an agreement.

III. Arbitrary and Capricious Action by the County Freeholders in Denying Kinsley's Expansion Application:

The City adopts by reference the contentions of Kinsley Landfill with respect to the unconstitutional anti-Philadelphia animus of the Freeholders being the prime if not sole motivating factor in the Freeholders decision to deny Kinsley's expansion application and thereby precipitate a manufactured solid waste disposal crisis which would result in Philadelphia's ouster from Kinsley.

IV. Equitable Discretion

The City contends that all users of Kinsley as of October 1984 (except the sludge depositors who are now denied access by NJDEP order) should bear equally the burdens of dislocation resulting from Kinsley's reaching capacity and being expanded only by a single vertical lift of approximately 1.8 million cubic yards in truck. The Court should treat all similarly-situated Kinsley users similarly and require pro-rata reductions in waste flows. The City has now exhausted all currently-available alternatives for its waste flow which had been going into Kinsley and thus is

identically-situated with the tri-county generators with respect to the need for access to Kinsley.

Respectfully submitted,

TOMAR, PARKS, SELIGER, SIMONOFF & ADOURIAN
Attorneys for the City of Philadelphia

BY: /s/ Steven Kudatzky

DATED: August 9, 1985

FILED
NOV 6 1985
JOSEPH F. SPANIOL, JR
CLERK

No. 85-707

IN THE
# SUPREME COURT OF THE UNITED STATES

October Term, 1985

CITY OF PHILADELPHIA,
*Petitioner*

*v.*

BOROUGH OF GLASSBORO, et al.
*Respondents*

## RESPONDENTS' BRIEF IN OPPOSITION AND APPENDIX

On Petition for Writ of Certiorari to
The Supreme Court of New Jersey

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30P

## LIST OF ALL PARTIES TO PROCEEDINGS

The following parties identified in the Petition are no longer participating in this litigation and should be deleted: Township of Woolwich, Ray McKay, Jr., Waste Removal Inc., Landis Sewage Authority, Rockaway Valley Regional Sewage Authority, Clementon Sewage Authority, Camden County Municipal Utility Authority.

## COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether a New Jersey Court order that authorizes a limited emergency expansion of a privately owned New Jersey landfill, which is regulated as a public utility and which has reached its authorized capacity, in order to accommodate a limited number of New Jersey municipalities for which no alternative sites are presently available for a limited duration of approximately one year until those municipalities develop permanent local alternative sites as required by the Order, which enjoins, *inter alia*, the disposal of all waste generated outside of those municipalities, including waste generated elsewhere in New Jersey as well as all other out-of-state waste, violates the Commerce Clause of the United States Constitution.

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IN THE

# SUPREME COURT OF THE UNITED STATES

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October Term, 1985

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CITY OF PHILADELPHIA,

*Petitioner*

*v.*

BOROUGH OF GLASSBORO, et al.

*Respondents*

---

On Petition for Writ of Certiorari to
The Supreme Court of New Jersey

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## RESPONDENTS' BRIEF IN OPPOSITION AND APPENDIX

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### COUNTERSTATEMENT OF THE CASE

Kinsley Landfill, Inc. (Kinsley) is a privately owned landfill, operating pursuant to New Jersey Law as a public utility, located in Deptford Township, Gloucester County, New Jersey. After approximately 25 years of operation, it was about to reach its authorized design capacity in 1984. Its application to the Gloucester County Board of Chosen Freeholders (Gloucester County) for a major expansion, which would have allowed continued long term operation, was denied on September 24, 1984. Consequently, on October 11, 1984, Kinsley notified its

customers, including the Borough of Glassboro (Glassboro) and other municipal respondents herein, that it would close on October 28, 1984. (A.4-5)

Pursuant to the New Jersey Solid Waste Management Act, *N.J.S.A.*13:1E-1 et seq., each county is required to formulate, adopt and continually update a county-wide solid waste management plan which is then subject to review, modification and approval by the New Jersey Department of Environmental Protection (DEP). These county plans then form the component parts of the State Solid Waste Management Plan. Gloucester County's initial Plan was adopted in 1979 and approved by DEP in 1980, after which it was updated in 1982, which update was approved by DEP in 1983. The cornerstone of the Plan is the designation of Kinsley as the *only* site for disposal of *all* solid waste generated in Gloucester County (with minor exceptions not here relevant) through 1988, by which time Gloucester County would implement a resource recovery facility for its long range solid waste disposal program. (A.131-138) DEP has uniformly ordered that interdistrict waste flow agreements be entered into between Gloucester County and *all* sending districts, regardless of state of origin, as a condition of usage of Kinsley.

Philadelphia has never entered into such an agreement with Gloucester County, despite the good faith efforts of Gloucester County to negotiate such an agreement. (A.10) With no waste flow agreement in place, the amount of waste entering Kinsley from Philadelphia was totally unrestricted. Consequently, the volume entering Kinsley from Philadelphia tripled from 1981 to 1984. At the same time, waste entering the facility from the neighboring New Jersey counties of Camden and Salem, which executed waste flow agreements, remained constant. (A.39)

Pursuant to mandates of the New Jersey Solid Waste Management Act, the Gloucester County Plan provided

for a minimum ten year planning period for waste disposal. However, as a result of the unresticted flows from Philadelphia, the approved and authorized capacity at Kinsley was exhausted in 1984, rather than lasting until 1988 as contemplated by the County Plan. (A.59-60)

Kinsley had been receiving waste generated in New Jersey, Pennsylvania and Delaware. (A.79-80) Fifty-nine small municipalities located in Gloucester County and the adjoining counties of Camden and Salem were disposing *all* of their waste at Kinsley. Historically, these municipalities had always disposed of all of their waste at local facilites. It has always been this way, and these municipalities never had the need to plan or provide for disposal of all or any portion of their waste at distant disposal sites. On the contrary, Philadelphia had been disposing of more than one-half of its waste at sites other than Kinsley. (A.11) Its Streets Department contains a substantial work force, owns and operates transfer stations, maintains storage pits, and owns substantial rolling stock, including large-capacity, over-the-road trash hauling vehicles, which are capable of and had been making the longer runs to more distant disposal facilities. In these proceedings, the Philadelphia Streets Commissioner testified that Philadelphia could accommodate the closure of Kinsley, and that Philadelphia could divert its flows to other available sites, some of which it was already utilizing. The Court accordingly found that Philadelphia could accommodate the closure of Kinsley and would not be confronted with a public health crisis if its use of Kinsley were terminated. (A.99-100)

Faced with the impending premature closure of Kinsley, Gloucester County officials embarked on a three-state search for alternate facilities. The only potential site which they were able to locate was the Colebrookdale Landfill in Berks County, Pa., 75 miles distant from Gloucester County. Although Gloucester County

entered into negotiations with Colebrookdale for a disposal contract (A.218), no such contract was ever consummated. In fact, such a contract was made impossible when, on October 2, 1984, eminent domain proceedings were instituted pursuant to Pennsylvania law by a public entity in Pennsylvania against the Colebrookdale facility. (R.G.A. 2)*

Confronted with the imminent closure of Kinsley and with no alternative facilities available, Glassboro turned to a court of equity for relief, filing suit on October 17, 1984 against Gloucester County, the DEP and its Commissioner, Kinsley, the City of Philadelphia and the County of Camden. The verified complaint alleged that the closure of Kinsley, without alternatives available, would result in immediate and irreparable harm to the residents of Glassboro. (A.137) As alleged in the complaint (A.149-152), the Court found that even if Colebrookdale, the only possible alternative site, were available, it would not provide a reasonable and viable alternative for the 59 New Jersey municipalities, since they lacked the equipment, transfer stations, manpower, etc., to suddenly begin making long hauls without adequate lead time to gear up for such a drastic change in their trash collection and disposal programs. The Court thus concluded that "practical considerations demonstrate that the task confronting the tri-county municipalities would be not merely difficult, but virtually impossible to perform." (A.43, 45, 65-66) Trash would pile up in the streets of Gloucester, Camden and Salem counties if a local facility was not provided. (A.109)

The trial court conducted several days of hearings and then ordered Gloucester County and the DEP to file reports of a timetable for the orderly closesure of Kinsley. Those reports concluded that no alternative sites within any reasonable proximity to the 59 municipalities were available, that permanent in-county alternative facilities

* "R.G.A." refers to Respondent Glassboro's Appendix.

must be implemented on an accelerated one year schedule, and that a limited vertical expansion of Kinsley to accommodate the flows from those 59 municipalities for the one year transition period could be accomplished without harm to the environment. However, waste generated outside the 59 municipalities would have to be excluded from participation in the vertical expansion in order to assure adequate capacity for the one year interim period. The Court adopted this approach, finding that implementation of the limited and temporary vertical expansion was necessary to prevent immediate and irreparable harm to the 59 New Jersey municipalities, while exclusion of all other waste, originating in Philadelphia and elsewhere, *both within and without* New Jersey, would cause no such harm. The Court accordingly issued an Order for Preliminary Injunction on November 13, 1984, the subject of the within Petition for a Writ of Certiorari. (A.11-14)

That Order contains several integrated and interdependent components, which imposed substantial burdens on all affected parties: Gloucester, Salem and Camden counties were required to site and implement county landfills on an accelerated one year timetable (a procedure which normally takes two years). A single 16 foot vertical expansion at Kinsley was authorized which contains an estimated useful life of one year with usage limited to the 59 municipalities. The 59 municipalities were required to immediately implement mandatory recycling programs, with the resulting reduction in flows being required to provide the estimated one year capacity. And, of course, the Order excluded from Kinsley all waste generated outside the tri-county area. (A.118-112)

Applications by Philadelphia for a stay of the Order for Preliminary Injunction were denied by the New Jersey Appellate Division, the New Jersey Supreme Court and a single Justice of the United States Supreme Court. Thereafter, on February 15, 1985, the New Jersey Appellate Division unanimously affirmed the Order, which,

in turn, was unanimously affirmed by the New Jersey Supreme Court on July 10, 1985. On October 8, 1985, the City of Philadelphia filed the within Petition for a Writ of Certiorari.

The matter is presently pending before the New Jersey trial court for final adjudication. Trial of the case is scheduled to commence on January 14, 1986. Issues to be addressed and finally determined at that trial include whether or not the action of Gloucester County in denying Kinsley a substantial expansion of its facility was arbitrary, capricious and unreasonable and whether or not the injunctive relief contained in the Order for Preliminary Injunction should be dissolved, modified or made permanent. (R.G.A.1)

## SUMMARY OF ARGUMENT

This Court lacks jurisdiction to issue the Writ of Certiorari because the subject State Court decision is not a final judgment or decree, but an affirmance of a trial court Order for Preliminary Injunction. The litigation is ongoing, and trial in the State Court is imminent, after which a final adjudiction will issue.

If, *arguendo,* this Court accepts jurisdiction, the Petition should nonetheless be denied, because the State Court correctly applied well-settled Commerce Clause principles and no new question of federal law is presented. The New Jersey State Court decision is clearly correct.

In reliance upon the Gloucester County Solid Waste Management Plan, fifty-nine small municipalities in Gloucester, Camden and Salem counties, New Jersey, reasonably anticipated that they would be able to continue disposing of their waste at Kinsley until 1988, at which time their respective counties would have long term resource recovery facilities on line. Therefore, none of these municipalities ever had the need to plan for disposal of their waste at distant disposal sites. They

planned their capital equipment needs, manpower requirements, capital budgets, debt service and other long range planning requirements for trash disposal in contemplation of continued, uninterrupted disposal at local facilites.

Without prior warning, on October 11, 1984, Kinsley notified its users that it would reach capacity and close on October 28, 1984. These municipalities lacked the manpower and equipment capabilities to suddenly begin hauling their trash to distant disposal sites. It would have been impossible for them to dispose of their waste if they were barred from Kinsley. With no viable alternative sites available, these municipalities would have suffered immediate and irreparable harm if not permitted to continue disposing of their waste at Kinsley until viable alternatives were made available. Trash would have piled up in the streets. The impossibility of performance did not result from economic considerations, but from the non-existance of transfer stations, storage pits, large over-the-road trash hauling vehicles, etc.

The City of Ph ladelphia was in a materially distinguishable position. The health and welfare of its residents would suffer no harm if it was barred from Kinsley. It had available alternative disposal sites to which it had already been sending more than one-half of its waste. The City possessed the manpower and equipment capabilities to redirect its flows to its alternative sites. The City Streets Commissioner testified that the City could accommodate the closure of Kinsley. The Court so found.

Kinsley had reached its permitted capacity, and it would not, under normal circumstances, have been allowed to continue to legally operate. Only a very limited expansion of the landfill could be permitted consistent with environmental concerns. In order to prevent a public health crisis to those users who did not have viable alternative disposal sites readily available, the trial court,

sitting as a court of equity, properly issued emrgent injunctive relief to prevent closure as to them. In a proper exercise of judicial restraint, the Court ordered only that which was necessary to prevent such immediate and irreparable harm. With respect to users who had other disposal sites readily available and to whom Kinsley would have closed anyway, no such order was required.

Such a distinction was plainly warranted by the facts in this case. The distinction was not an act of economic protectionism. The Order does not constitute an unconstitutional discrimination against any party. It was necessary to protect the health and welfare of some users of a landfill which had reached its capacity. It was not necessary with respect to other users where no harm would ensue. It is only incidental that the users in one category were from New Jersey whereas some of the users in the other category were from out-of-state. The classifications are reasonable and are not based upon state boundaries. Therefore, the effect on interstate commerce is merely incidental and not violative of the Commerce Clause of the United States Constitution.

Philadelphia's claim of improper interstate discrimination is unwarranted. The Order applied evenhandedly to all affected parties to effectuate a legitimate local public purpose, namely the prevention of an immediate public health crisis. The Order does have some incidental effect upon interstate commerce, which is very slight. Philadelphia will be somewhat inconvenienced, at a modestly increased cost. It will suffer no irreparable injury. This incidental effect does not rise to the level of an impermissible burden upon interstate commerce. It cannot be said that this effect is "clearly excessive in relation to the putative local benefits".

## ARGUMENT

### 1. THIS COURT LACKS JURISDICTION TO ISSUE THE WRIT OF CERTIORARI

Petitioner assets jurisdiction of this Court pursuant to 28 *U.S.C.* §1257(3) and 28 *U.S.C.* §2101(c). Those sections, however, clearly and unambiguously require the entry of a final judgment or decree by the highest court of a state before jurisdiction is conferred upon the United States Supreme Court. The subject matter of the within Petition is an Order for Preliminary Injunction which, by its terms, may be modified or dissolved on one-day notice. (A.122) The trial court retains jurisdiction of the case, and trial is scheduled to commence on January 14, 1986. The federal question which constitutes the subject matter of the within Petition awaits final State Court adjudication at the conclusion of that trial. The New Jersey courts have proceeded on an extremely accelerated schedule, and it is only reasonable to anticipate that such dispatch will continue until a final adjudication is obtained.

In light of the one-day modification or dissolution provision contained in the Order itself and the imminent trial date, it cannot be claimed that the Order for Preliminary Injunction is tantamount to a final judgment.

Therefore, it is respectfully submitted that this Court lacks jurisdiction over the subject matter until such time as the New Jersey Supreme Court renders a final judgment. On that basis alone, the Petition should be denied.

## II. THE DECISION OF THE NEW JERSEY SUPREME COURT DOES NOT CONSTITUTE AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT ALREADY BEEN DECIDED BY THIS COURT OR WHICH IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, AND SAID DECISION IS CLEARLY CORRECT.

A Writ of Certiorari is not a matter of right, but of judicial discretion and will be granted only when special and important reasons are presented for its issuance. Such a reason may be presented when a State Court has decided an important federal question which has not been previously decided by this Court or in a way which is in conflict with applicable decisions of this Court. *U.S. Supreme Court Rule 17, 28 U.S.C.A.* Although not expressly stated, this appears to be the purported basis underlying the Petition.

The thrust of the Petition is that the Order for Preliminary Injunction constitutes an impermissible act of economic protectionism by the New Jersey Court, in violation of the Commerce Clause of the United States Constitution. Petitioner asserts that "The situation effectuated by this injunction is the same as that which the Court faced in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), when New Jersey attempted to legislate the exclusion of out-of-state solid waste from its landfills." (Pet.28-29)* Petitioner continues that "this Court has previously rejected in *Philadelphia v. New Jersey, supra*, the very same argument put forth by New Jersey in support of this direct prohibition against all interstate commerce flowing into the Kinsley Landfill, namely, the need to conserve landfill sites in New Jersey which are scarce resources, for the needs of local New Jersey communities." (Pet.44) Thus, Petitioner concludes that the

---

* "Pet." refers to the Petition for Writ of Certiorari.

Order for Preliminary Injunction is in contravention of this Court's opinion in *Philadelphia v. New Jersey, supra.* (Pet.62)

This analysis and conclusion blatantly ignore the substantial differences in the material facts underlying the two decisions. In *Philadelphia v. New Jersey, supra,* the Court considered New Jersey legislation which imposed a *total* ban on *all* out-of-state waste. This Court held that "whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the state *unless there is some reason, apart from their origin, to treat them differently.*" 437 U.S. at 626-27 (emphasis added) In the case now before the Court, the different resulting treatment of waste generated in Philadelphia, Pennsylvania and elsewhere in and out of New Jersey and that generated in 59 municipalities in New Jersey *is* based upon a legitimate reason, apart from state of origin.

In the instant case, the trial court was confronted with a situation where one landfill in New Jersey had reached its authorized capacity. If the Court took no action, that landfill would have simply closed and been unavailable to all of its previous users, including Philadelphia. Waste generators outside the tri-county area would have rerouted their waste streams elsewhere, as they have, in fact, done. The 59 municipalities in the tri-county area, however, for whom that landfill served as a sole disposal source, would have been thrust into the throes of a major public health crisis. Sitting as a court of equity, the trial judge issued an emergent equitable order providing for the continued use of Kinsley for a short period fo time, subject to stringent conditions, by only those users which had no alternative in order to prevent immediate and irreparable harm to their citizenry.

The Order for Preliminary Injunction does not constitute an invidious discrimination against Philadelphia or any other party. In fashioning a remedy, the trial court

applied the same traditional equiable principles to all pre-existing users of Kinsley. The needs of some of those users, which happen to be located in New Jersey, required injunctive relief to prevent immediate and irreparable harm, whereas the needs of other users, some of whom are located in New Jersey and some of whom are located out-of-state, did not require such judicial intervention with respect to a landfill that would have closed in the absence of court action. The differing results were produced because of a real and rational distinction between the parties and a Constitutionally valid classification. *Minnesota v. Clover Leaf Creamery Co.* 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed. 2d 659 (1981).

This state of facts is very different from the facts considered by this Court in 1978, which involved a total ban by New Jersey of virtually all out-of-state waste "in the ordinary course of business". In that case, this Court held that the New Jersey legislation was facially discriminatory and constituted a *per se* violation of the Commerce Clause. A similar result was reached in *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 102 S.Ct. 3456, 73 L.Ed. 2d 1254 (1982). In *Sporhase*, although the Court struck a facially discriminatory statute which required reciprocal rights as a condition of exportation of ground water into another state, the Court indicated that had Nebraska demonstrated a statewide water shortage, a reciprocity provision or even a total ban on exportation of water may have been sustainable to advance its legitimate purpose of preserving and conserving a vital natural resource. Under the facts existing, however, the Court concluded that the statute was not "narrowly tailored to serve that purpose." *Id.* 102 S.Ct. at 3465.

The trial court in this case, confronted with an immediate crisis, issued an integrated order to prevent that crisis, in a manner which was least burdensome to all parties. The facts involve only one landfill and one set of users. The action taken by the court was limited to those facts and in no way implicates the national economy.

The order was "narrowly tailored" to achieve its intended purpose. The order regulates evenhandedly to effectuate a legitimate local public interest. Its effect on interstate commerce is only incidental and very slight. Such effect is not clearly excessive in relation to the putative local benefit. *Pike v. Bruce Church Inc.* 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed. 2d 174 (1970); *City of Philadelphia v. New Jersey, supra.*

In *Minnesota v. Clover Leaf Creamery Co., supra,* this Court held that:

> Minnesota's statute does not effect "simple protectionism", but "regulates evenhandedly" by prohibiting all milk retailers from selling their products in plastic, nonreturnable milk containers, without regard to whether the milk, the containers, or the sellers are from outside the State. This statute is therefore unlike statutes discriminating against interstate commerce, which we have consistently struck down. [citations, including *Philadelphia v. New Jersey,* omitted.]
>
> Since that statute does not discriminate between interstate and intrastate commerce, the controlling question is whether the incidental burden imposed on interstate commerce by the Minnesota Act is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church Inc., supra,* at 142, 90 S.Ct. at 847. We conclude that it is not. 499 U.S. at 472-473, 101 S.Ct. at 728.

In reaching this conclusion, the Court reasoned that even though the statute resulted in a greater burden on out-of-state industry than Minnesota industry, "this burden is not 'clearly excessive' in light of the substantial state interest in promoting conservation of energy and other natural resources and *easing solid waste disposal problems* . . ." 499 U.S. 474, 101 S.Ct. 729 (emphasis

added) Likewise, the City of Philadelphia may experience some minor inconvenience, at a modestly increased cost, in the disposal of its solid waste. This incidental effect, however, does not rise to the level of an impermissible burden upon interstate commerce. It cannot be said that this effect is "clearly excessive in relation to the putative local benefits". The local interest involved is the prevention of an immediate public health crisis. The tightly woven order applies evenhandedly to all prior users of Kinsley, allowing only those parties who would otherwise face such a crisis access to the very limited additional capacity which the Court has made available at Kinsley, a facility which had already reached its legal limit and was about to close. Such a compelling interest would allow toleration of a much greater burden upon interstate commerce before it would violate the *Pike v. Bruce Church Inc.* test of Constitutionality.

Economic protectionism was neither the purpose nor effect of this Order. Although the City of Philadelphia, by happenstance, was Kinsley's largest customer, accounting for 53.9% of its volume (A.9), waste from 13 counties in New Jersey, accounting for approximately 6.1% of Kinsley's volume was also excluded by the Order. (A.28) Therefore, the Order treats Philadelphia on an evenhanded basis with numerous other New Jersey users. It is also noteworthy that the Order imposed very substantial burdens, including a three-fold cost increase upon the 59 municipalities who have been granted access to the emergent limited expansion at Kinsley (A.24-25), a fact which militates strongly against petitioner's claim of economically modified parochialism.

In rejecting Philadelphia's claim of economic protectionism, the New Jersey Supreme Court succinctly stated:

> If no state line existed between New Jersey and Pennsylvania, we would uphold the injunction as a valid exercise of the powers of a court of equity. As

an equitable remedy, the decree merely preserves space at Kinsley for certain municipalities that, as a practical matter, do not have access to other landfills, while remitting other municipalities, including Philadelphia, to alternative sites. Additional garbage from any source, either within or outside New Jersey, will displace space at Kinsley needed to avert a health crisis in the three counties. In avoiding that crisis, the injunction also effectuates the legislative and regulatory scheme for the disposal of solid waste.

The mere fact that Philadelphia is in another state should not imbue it with greater rights than it would possess if it were located in New Jersey. The Commerce Clause was intended as a shield against discrimination, not as a sword to obtain preference. We conclude that the injunction is not discriminatory in purpose or effect. It is plainly not a mere protectionist measure and, therefore, does not constitute a *per se* violation of the Commerce Clause. *Philadelphia v. New Jersey, supra*, 437 U.S. at 623, 98 S.Ct. at 2535, 47 L.Ed.2d at 481. *Borough of Glassboro v. Gloucester County Board of Chosen Freeholders*, 99 N.J. Super. 91, 488 A.2d. 562 (1985) Aff'd, 100 N.J. 134 (146-147) 495 A.2d 49 (1985) (A.28-29)

Having thus determined that the Order does not constitute a *per se* violation, the New Jersey Court then evaluated its propriety in light of the *Pike v. Bruce Church Inc.* test:

The closure of Kinsley, however, involves more than cost considerations. It would force the tri-county municipalities to embark on a crash garbage disposal program, one that would include, for example, siting and establishing transfer stations to store garbage temporarily, pending delivery to a permanent site. Such a program, as formidable and costly

as it would be, would become obsolete in one year, when the new dump sites become operative. Furthermore, as the Appellate Division stated, "[s]ome towns such as Clayton, Elmer and Woodstown had no alternative to their present private-hauler service if Kinsley were closed without access to an alternate local source. The private haulers would simply close down." *Id.* Thus, practical considerations demonstrate that the task confronting the tri-county municipalities would be not merely difficult, but virtually impossible to perform. Such considerations confirm that the burden on Philadelphia is not excessive. *Borough of Glassboro v. Gloucester County Board of Chosen Freeholders, supra*, at 100 N.J. at 152 (A.42-43)

In analyzing the Order for Preliminary Injunction, the New Jersey Supreme Court has correctly applied the well-established Commerce Clause principles which have been enunciated by this Court in prior holdings. No new question of federal law is presented. The New Jersey Supreme Court decision is consistent with applicable decisions previously rendered by this Court. The decision of the New Jersey Supreme Court is clearly correct.

## CONCLUSION

The subject matter of the Petition is an Order for Preliminary Injunction issued by a New Jersey State Court in ongoing litigation which is scheduled for trial to commerce on January 14, 1986. No final judgment or decree has been rendered, and the matter is not ripe for the issuance of a Writ of Certiorari. This Court lacks jurisdiction at this posture of the litigation.

If, *arguendo*, the Court determines that it does possess jurisdiction, the Petition should nonetheless be denied. Petitioner has failed to establish a special and important reason requiring review by this Court. The Order constitutes a measured response by the New Jersey

Court, carefully and narrowly adapted to the peculiar facts and circumstances in this case. It involves only one landfill which has already reached its legal capacity and the users of that facility. It does not establish a policy or regulation of general application which would impact upon the movement of solid waste or any other articles in interstate commerce. The Order does not implicate the national economy. No important question of federal law which has not already been settled by this Court is in issue. The New Jersey Supreme Court decision is consistent with all applicable decisions of this Court and is clearly correct.

For the reasons stated, it is respectfully submitted that review of the New Jersey Supreme Court decision by this Honorable Court is not warranted. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Joseph F. Lisa, Esquire
Counsel of record for Respondents
Borough of Glassboro, Glassboro
Board of Health, Borough of Clayton,
Township of Monroe, Township of
West Deptford, Borough of National
Park, Borough of Swedesboro,
Borough of Wenonah, City
of Woodbury, Borough of Pitman,
Township of Franklin,
Borough of Westville

STATE OF NEW JERSEY :
ss
COUNTY OF GLOUCESTER :

JOSEPH F. LISA, ESQUIRE, being duly sworn according to law, upon his oath deposes and says:

1. I am an attorney-at-law of the State of New Jersey and the attorney of record in the New Jersey State Court proceedings in the case of *Borough of Glassboro, et al v. Gloucester County Board of Chosen Freeholders, et al*, representing the Borough of Glassboro, Glassboro Board of Health, Borough of Clayton, Township of Monroe, Township of West Deptford, Borough of National Park, Borough of Swedesboro, Borough of Wenonah, City of Woodbury, Borough of Pitman, Township of Franklin and Borough of Westville.

2. On October 18, 1985, I appeared before the Honorable Samuel G. DeSimone, Assignment Judge of the New Jersey Superior Court, in the Law Division of said Court (a trial division) for a hearing upon various motions in said litigation. Other parties which remain active in the litigation, including the City of Philadelphia, were represented at said hearing.

3. One of the motions considered at said hearing dealt with the scheduling of the case for trial. Judge DeSimone ordered that the trial shall commence on January 14, 1986.

4. Among the issues to be considered at that trial are (a) whether the action of the Gloucester County Board of Chosen Freeholders in denying Kinsley Landfill Inc. a substantial expansion of its facility was arbitrary, capricious and unreasonable; and (b) whether the injunctive relief contained in the Order for Preliminary Injunction of November

13, 1984 should be dissolved, modified or made permanent.

Sworn to and subscribed
before me this 31st day
of October, 1985.

Joseph F. Lisa

DORIS H. DOROFEE
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires August 29, 1988

IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

| | | |
|---|---|---|
| A CONDEMNATION PROCEEDING IN REM BY THE BOROUGH OF LANSDALE | : | No. |
| FOR THE PURPOSE OF ACQUIRING FEE SIMPLE TITLE TO HOLD, CONSTRUCT, IMPROVE, MAINTAIN, AND OPERATE A SANITARY LANDFILL AND RESOURCES RECOVERY SYSTEMS ON PROPERTY DESCRIBED HEREIN IN EARL TOWNSHIP | : | EMINENT DOMAIN PROCEEDING IN REM |

## DECLARATION OF TAKING

The Borough of Lansdale, Montgomery County, Pennsylvania, does hereby respectfully declare that:

1. The land herein described is condemned and taken by the Borough of Lansdale, Montgomery County, Pennsylvania, a political and municipal subdivision of the Commonwealth of Pennsylvania, hereinafter referred to as "Condemnor".

2. The Condemnor's offices are located at 421 West Main Street, Lansdale, Montgomery County, Pennsylvania.

3. The instant condemnation and taking is made pursuant to the provisions of the Borough Code and all other enactments of the Legislature of the Commonwealth which grants unto the Condemnor, as a borough, the powers and rights of condemnation. More specifically, such condemnation and taking is made upon the basis of the Act of February 1, 1966, P.L. , No. 581, Sections 1501, 2513 and 1202(45) thereof; 53 P.S. §§46501, 47513 and 46202(45) and an Ordinance of the Borough of Lansdale, Condemnor, enacted on October 2, 1984, described more fully hereinafter.

4. The instant condemnation and taking is made pursuant to and upon the basis of a certain Ordinance of the Condemnor, being Ordinance No. 1307 adopted on October 2, 1984, by the governing body of Condemnor after due, proper and lawful advertisement of same and due and proper consideration of the contents thereof by the governing body of the Condemnor. A copy of said Ordinance is attached hereto, incorporated herein as fully as if set forth in the body of this Declaration, made a part hereof, and marked as Exhibit "A". The original of such Ordinance may be examined at the offices of the Condemnor.

5. The land is being condemned for and the purpose of the instant condemnation is to effectuate the acquisition of such property so as to insure compliance with Act 97 of the Commonwealth, being known as the "Solid Waste Management Act", Act of July 7, 1980, P.L. 830, No. 97, by permitting Condemnor to hold, own, construct, improve, maintain and operate a sanitary landfill and related facilities. The instant condemnation is also undertaken so as to enable the Condemnor to carry out its functions and powers as provided by the Borough Code of acquiring, holding, owning, constructing, improving, maintaining and operating a sanitary landfill and related facilities.

6. The land condemned consists of all of those certain parcels, premises and tracts of land located in Earl Township, Berks County, Pennsylvania, being owned by RRM Corporation, and being more specifically described in confirmatory deeds or indentures of Colebrook Builders, Inc. to RRM Corporation dated December 15, 1982 and recorded in the Office of the Recorder of Deeds in and for Berks County, Pennsylvania at Deed Book No. 1825, Page 870 and

a deed or indenture of Thorpe, *et al.* to RRM Corporation dated September 11, 1981 and recorded in the Office of the Recorder of Deeds in and for Berks County, Pennsylvania, at Deed Book No. 1806, Page 155. Copies of the aforementioned deeds or indentures are attached hereto as Exhibit "B". The descriptions of land contained therein are incorporated herein as fully as if set forth at length herein in the body of this Declaration, and made a part hereof as a description of the land condemned and taken under the aforesaid Ordinance and under the aforementioned powers or rights of the Condemnor.

7. Condemnor will or has acquired, as a consequence and result of the filing of this proceeding, a fee simple, absolute title in and to such premises.

8. A plan showing the condemned property may be inspected at the offices of the Condemnor during the regular business hours of such Condemnor.

9. The only known interest in the land condemned by Condemnor are held by RRM Corporation, all as if aforesaid.

10. Just compensation for the taking or condemnation of said property has been made or is secured by the power of taxation of the Borough of Lansdale, whereupon to be raised, or lawful so to be raised, are deemed pledged and made secure for the payment of just compensation or damages as shall be determined by law.

WHEREFORE, the Borough of Lansdale, Condemnor, has caused this Declaration to be approved and acknowledged this 2nd day of October, 1984.

ATTEST:

_____

BOROUGH OF LANSDALE,
PENNSYLVANIA

By:_____
Council President

RHOADS & SINON

By:_____
Jan P. Paden
J. Bruce Walter
410 North Third Street
P.O. Box 1146
Harrisburg, PA 17108-1146

Attorneys for Condemnor,
Borough of Lansdale

COMMONWEALTH OF PENNSYLVANIA :
ss
COUNTY OF MONTGOMERY :

F. LEE MANGAN, being duly sworn according to law, deposes and says that he is the Secretary of the Borough of Lansdale and makes this affidavit on its behalf, being familiar with the facts, and having authority to do so, and that all the statements in the foregoing Declaration of Taking are true and correct to the best of his knowledge, information and belief.

F. LEE MANGAN

Sworn to and subscribed
before me this 3rd day of
October, 1984.

Notary Public

My Commission Expires:

PAMELA M. BENNETT, NOTARY PUBLIC
LANSDALE BORO, MONTGOMERY COUNTY
MY COMMISSION EXPIRES JULY 23, 1985
Member: Pennsylvania Association of Notaries

Supreme Court, U.S.
FILED
NOV 8 1985
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 85-707

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CITY OF PHILADELPHIA,
*Petitioner,*

*v.*

BOROUGH OF GLASSBORO, et al.,
*Respondents.*

## BRIEF OF GLOUCESTER COUNTY BOARD OF CHOSEN FREEHOLDERS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petition for Writ of Certiorari
to the Supreme Court of New Jersey

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43pp

## QUESTIONS PRESENTED FOR REVIEW

Whether or not a New Jersey Court Order that enjoins solid waste from outside New Jersey, counties of Camden, Salem and Gloucester, from being disposed of in a judicially created lift in an otherwise exhausted landfill on the grounds that the landfill was the only available interim disposal site available to those counties is violative of the Commerce Clause of the United States Constitution?

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## COUNTER-STATEMENT OF CASE

Petitioner, City of Philadelphia, is seeking a stay of an interlocutory order of the Superior Court of New Jersey, Law Division, wherein the trial court, faced with an undisputed health and safety crisis arising out of the imminent closing of a sanitary landfill which had reached its permitted capacity, directed an orderly closure of the landfill, to wit, allowing certain New Jersey municipalities which had no alternatives and which were in counties that had entered interdistrict waste agreements with the host county to continue using the landfill for a limited period of time, conditioned upon agreeing to substantial remedial orders, while excluding other New Jersey counties as well as Pennsylvania users, both because other alternatives were available to them and because they had not entered interdistrict waste agreements with the host county.

In opposition to petitioner's application, respondent Gloucester County Board of Chosen Freeholders shows as follows:

1. Kinsley Landfill is located in Deptford Township, Gloucester County, New Jersey, and is owned and operated by Kinsley Landfill, Inc. In recent years, Kinsley has been utilized for the disposal of solid waste generated in a number of municipalities within New Jersey and also in Pennsylvania and Delaware. The Gloucester County Board of Chosen Freeholders and the New Jersey Department of Environmental Protection are regulators of Kinsley Landfill pursuant to the New Jersey Solid Waste Management Act, *N.J.S.A.* 13:1E-1 *et seq.* They are charged with the responsibility of having a coordinated countywide and statewide scheme for the collection and disposal of solid waste and for weighing the public risks and benefits with regard to the siting of landfills and with regard to landfill capacity. (Ra A-4)

---

*Ra Respondents appendix

2. During the early part of 1984, it became apparent that the maximum capacity authorized for Kinsley pursuant to a permit issued by the New Jersey Department of Environmental Protection would be reached before the end of 1984 rather than the original projected date of 1988. (Pa 132A) Waste in excess of the permitted amount could not be legally accepted unless first authorized by Gloucester County pursuant to an amendment to the County Solid Waste Plan and then subsequently approved by the New Jersey Department of Environmental Protection. (Ra A-4) During the summer of 1984, Gloucester County held hearings to determine if additional capacity should be authorized for Kinsley and considered substantial testimony with regard to the various issues inherent in such a determination. On September 28, 1984, Gloucester County determined that the public interest would best be served by adhering to and not deviating from the original capacity authorized for Kinsley and thereby rejected an application for a plan amendment for landfill expansion at Kinsley. (Ra A-5) On October 11, 1984, Kinsley gave notice that, based upon anticipated volume in the next few weeks, the approved capacity would be reached during the week of October 28, 1984, and therefore all users should make plans for switching to another facility. (Ra A-5)

3. On October 18, 1984, the Borough of Glassboro filed suit against the Gloucester County Board of Chosen Freeholders; the New Jersey Department of Environmental Protection and its commissioner; Kinsley Landfill, Inc.; the City of Philadelphia and the County of Camden, seeking to enjoin both the closure of the landfill and the use of the landfill for disposal of waste generated in the County of Camden and the City of Philadelphia. Thereafter, various parties intervened as plaintiffs, including numerous New Jersey municipalities which utilized the Kinsley landfill for disposal of

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*Pa Petitioners appendix

waste generated within their communities. Deptford Township, the situs of the Kinsley Landfill, intervened as a defendant and joined the New Jersey Department of Environmental Protection and Gloucester County in arguing that the trial court should not authorize the landfill to operate in excess of permitted levels. Defendant Philadelphia did not oppose the closing of the landfill, but it argued that if the landfill remained open, Philadelphia should be one of the parties authorized to continue utilizing the facility. (Pa 112A)

4. The trial court first held a hearing on October 19, 1984, and then heard testimony on October 23, October 24, October 25, and October 26, 1984. On October 26, 1984, the Court entered a temporary restraining Order directing , among other things, that Kinsley and the New Jersey Department of Environmental Protection report to the Court on November 9th, 1984 on the environmental feasibility of a vertical expansion of Kinsley for one additional lift of compacted solid waste, and that the New Jersey Department of Environmental Protection file with the Court a plan for the orderly closure of the landfill. All parties were directed to return before the court on November 13, 1984. During the interim all parties were permitted to continue to utilize the facility. (Ra A-12)

5. On November 13, 1984, the trial court made factual findings and entered a preliminary injunction, including the following:

> a. Kinsley Landfill was directed to implement a vertical expansion of one additional lift (16 feet) of compacted solid waste in accordance with the design approved by the New Jersey Department of Environmental Protection; (Pa 90A)
>
> b. This additional capacity, which at best would last for one year, was to be restricted for use by Gloucester County and those other districts which

had entered into interdistrict waste agreements with Gloucester County, to wit, Camden and Salem Counties; (Pa 89A)

c. Camden, Gloucester and Salem Counties were placed under the court order to proceed immediately with the siting of landfills which were to be operational within 12 months of the November 13, 1984 court order; (Pa 89A)

d. As of November 27, 1984, except for waste generated in Camden, Gloucester and Salem Counties, all solid waste therefore disposed of at Kinsley which had been generated in other New Jersey counties and municipalities as well as in Pennsylvania and Delaware communities and which was not subject to interdistrict waste agreements with Gloucester County, would no longer be accepted at Kinsley; (Pa 89A)

e. All municipalities within the borders of Camden, Gloucester and Salem Counties were placed under court order to maximize their recycling efforts so as to reduce the amount of waste being disposed of during the interim period and to report periodically to the court and New Jersey Department of Environmental Protection. (Pa 89A)

6. On November 15, 1984, Philadelphia moved before the trial court seeking reconsideration of the November 13, 1984, order so as to allow Kinsley Landfill to continue accepting waste generated within the City. The City also asked the court to authorize a second vertical expansion of the landfill. After hearing testimony from experts from both the City and the New Jersey Department of Environmental Protection and considering the potential impacts, the trial court denied the application for a second lift and affirmed its prior Order of November

13, 1984. (Pa 112A) On November 21, 1984, Philadelphia again returned to the trial court and sought reconsideration regarding the application for a second lift. Additional affidavits were considered by the trial court, which subsequently found no basis to change the original factual findings upon which it had rejected the application for a second lift.

7. On November 26, 1984, the Appellate Division of the Superior Court of New Jersey denied Philadelphia's motion for leave to appeal and for a stay of the trial court order. (Pa 49A)

8. On November 27, 1984, Justice Alan B. Handler of the Supreme Court of New Jersey, sitting as a single justice, granted the City's motion for a stay pending consideration of the matter by the full New Jersey Supreme Court. Between November 27, 1984 and December 7, 1984, Philadelphia and two other haulers who had joined in the City's stay application continued to utilize the landfill. As a result, less than eleven months' capacity is left at Kinsley Landfill for Camden, Gloucester and Salem Counties before their new landfills must be sited, approved and become operational.

9. On December 7, 1984, the New Jersey Supreme Court vacated the interim stay granted by Justice Handler sitting as a single justice and denied the motion for a stay of the order of the trail court of November 13, 1984. However, the New Jersey Supreme Court granted Philadelphia's motion for leave to appeal and summarily remanded the appeal be accelerated. In accordance with the November 13, 1984, trial court order authorizing the parties to seek modification or dissolution of that order on short notice, the New Jersey Supreme Court directed the Appellate Division to continue limited jurisdiction in the trial court subject to appellate supervision. (Pa 51A)

The trial Court's preliminary injunction was affirmed unanimously by the New Jersey Superior Court, Appellate Division on February 15, 1983. (Pa 49A)

On July 10, 1985, the New Jersey Supreme Court also, in a unanimous opinion, affirmed the decision of the New Jersey Superior Court, Appellate Division. (Pa 1A)

## ARGUMENT

### I. Review by the Supreme Court of the United States is currently premature.

#### A. The Petitioners should be denied a writ of certiorari because there has been no final judgment by the State Court.

The Supreme Court of the United States only has jurisdiction to entertain appeals from State Court determinations which are Final Judgments. 28 USC 1257; *L. Costarelli v. Massachusetts,* 421 US 193, 195, n. 3 (1975). Specifically, the federal issue in a particular case must have been finally resolved by the highest Court of a State before the Court can intervene. *Chapman v. California,* 405 US 1020, (1972); *Gospel Army v. Los Angeles,* 331, US 543 (1947).

In the instant case, the federal issues are still very much alive at the trial level. Specifically, it is alleged that the Freeholders, when they denied Kinsley its' expansion, did so because of a desire to discriminate against interstate commerce. If such an allegation is found to be true, the trial court is authorized to exercise its' equitable discretion to fashion a remedy. Such a remedy could include re-opening the landfill to interstate commerce. Until this issue is resolved at the trial level, review by the Court would be both duplicative and premature.

Petitioners argue that the federal issue before the Court surrounds the trial court's order for preliminary injunction. The Order itself is open to modification until the trial court divests itself of jurisdiction. This will occur when a final judgment is reached. The paragraph 10 of

the Oct. 26, 1984 Order expressly provides for it's dissolution or modification on application made on one (1) day's notice (Pa 129A). Thus the Petitioners may seek relief from the trial court at anytime should they believe current facts warrant such relief.

The Court could treat the federal issue as final, not withstanding the pending state proceedings. *Local No. 438 Construction and General Laborer's Union v. Curry,* 371 US 542 (1963); *Nebraska Press Assoc. v. Stuart,* 423 US 1327 (1975); and *National Socialist Party v. Skokie,* 432, US 43 (1977). Yet in those cases, the Court was acting to protect an infringement on personal fundamental rights. In those cases the Court has placed a heavy presumption against any infringement to First Amendment Freedoms. *Local No. 438; National Socialist Party;* and *Nebraska Press Association.* Those fundamental freedoms are not at issue in the instant case.

The Court has adopted a much different standard when reviewing state actions under the commerce clause. In commerce clause cases the initial burden to demonstrate discrimination rests with the party attacking the state regulation. *Hughes v. Oklahoma,* 441 US 332 (1979). The presumption instead favors the regulation, a standard opposite that applied in the First Amendment cases. The Petitioners have failed, at any time to establish an irreversible or immediate harm to themselves constitutional or otherwise. The Courts of New Jersey have so held as findings of fact. Speedy review is not required to safeguard the rights of the Petitioners.

The Court would do well to wait until all the issues are fully developed by the trial court and reviewed by the highest New Jersey Courts before accepting a petition for certiorari.

**B. The Petitioners lack standing to seek review by the Court because there has been no injury in fact.**

The Petitioners argue that their denial of access to Kinsley is impermissable. This analysis ignores the realities of the situation. The landfill was exhausted. There was no capacity at the landfill for anyone until the Trial Court created the additional space.

Kinsley had no legal right to continue. It is not the closure which the Petitioners seek to attack but instead access to the judicially created lift. But for the trial courts actions there would be no one using the landfill. The petitioners, however, are not denied access to *any other* private landfill in the State of New Jersey. In order to have standing in the instant case the Petitioners must prove that they are foreclosed due to state action from any other private site in New Jersey, and also that the exclusion works a real injury to the petitioners. This two prong test has not been met by the petitioners.

The evidence is clear. The petitioner has access to many other sites in New Jersey. There is no state action which bars Philadelphia from contracting with any other private landfill in the State of New Jersey. The first prong of the test can not be met by the petitioners.

The petitioners as well, can not satisfy the second prong of the test, as there is no real injury to the petitioner. As the New Jersey Supreme Court noted in its' opinion:

> "Philadelphia's last access to an exhausted landfill must be contrasted with the disastrous results that its' continued use would visit on the tri-county municipalities. With respect to the economic impact of the closure, the Appellate Division observed than Philadelphia, a city of approximately 1.7 million people with a solid waste disposal budget of approximately $4,000,000.00 would suffer much less than the fifty-nine (59)

municipalities in the tri-county area. 199 *NJ Super* at 100. The estimated increase in Philadelphia's budget for solid waste disposal is 5% for the first year following Kinsley's closure and 2% thereafter. *Id.* By contrast, the solid waste disposal budget of Glassboro, a municipality of some 14,500 people, could escalate from $100,000.00 to $1,000,000.00 per year ***, * and the cost to Camden County, with a population of approximately 500,000 people, could increase from $3,000,000.00 to $12,000,000.00 annually. *Id.*

The closure of Kinsley, however, involves more than cost considerations. It would force the tri-county municipalities to embark on a crash garbage disposal program, one that would include, for example, siting and establishing transfer stations to store garbage temporarily, pending delivery to a permanent site. Such a program, as formidable and costly as it would be, would become obsolete in one (1) year, when the new dump sites become operative. Furthermore, as the Appellate Division stated:

'Some towns, such as Clayton, Elmer, and Woodstown, had no alternatives to their present private-hauler service if Kinsley were closed without access to an alternate local source. The private haulers would simply close down.' *Id.* Thus practical considerations demonstrated that the task confronting the tri-county municipalities would be not merely difficult, but virtually impossible to perform. Such considerations confirm that the burden on Philadelphia is not excessive." *Glassboro at 151, 152* . . . Moreover, Philadelphia has alternative sites to dispose of it's garbage, albeit ones that impose increased

> costs on the City. In contrast, the tri-county municipalities do not have access to alternative sites, to trucks, or to what may be of greater importance, to transfer stations. *"Glassboro v. Board of Chosen Freeholders of Gloucester County, 100 NJ 134, at 153, (1985).*

As the petitioners have noted in their belief, simple economic protection is not enough to legitimate state action. However, the reverse is also true, simply because the City must pay more for it's solid waste disposal does not justify overturning a legitimate state action. Aside from the incidental increase in costs, Philadelphia can not demonstrate any burden to interstate commerce. There is no state erected barriers which prohibits the petitioners from sending their trash elsewhere in New Jersey. The petition for writ of certiorari should be denied because the petitioner lacks standing to bring the appeal to the Court since there was no injury to interstate commerce.

## II. The Order for preliminary injunction is not a violation of the Commerce Clause.

The court has established a tripartite analysis in dormant commerce clause cases. The first test is to see if the state action is discriminatory on it's face. *Philadelphia v. New Jersey, 437 US 617 (1978).* The second test is to see if there is a discriminatory purpose or effect of an otherwise neutral state action. *Hunt v. Washington State Apple Advertising Commission, 432 US 333 (1977).* The final test and the modern approach is the balancing test articulated in *Pike v. Bruce Church, Inc., 397, US 137 (1970).*

**A) The order of preliminary injunction is not discriminatory on it's face.**

The petitioners argue that the order discriminates against all interstate commerce. The Court in *Phila. v. NJ 437 US 617 (1978)*, gave the test to be applied as follows:

> "[A] state may not accord it's own inhabitants a preferred right of access over consumers in other states to natural resources located within it's borders." [citations omitted] *Id at 627.*

> "But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *Id at 626.*

It is clear from the face of the Order that the origin of the trash was not the deciding factor in its exclusion. "The mere fact that Philadelphia is in another state should not imbue it with greater rights than it would possess if it were located in New Jersey. The commerce clause was intended as a shield against discrimination, not as a sword, to obtain a preference." *Glassboro at 147* "Additional garbage from any source, either within or outside New Jersey, will displace space at Kinsley needed to avert a health crisis in the three counties." *Id at 147.*

The New Jersey Supreme Court concluded by holding that "the injunction is not discriminatory in purpose or effect. It is plainly not a mere protection and measure and, therefore, does not constitute a *per se* violation of the commerce clause. [citations omitted]" *Id at 147.*

The petitioners rely on *Philadelphia v. New Jersey, Supra*, as controlling in the instant case. This reliance is misguided. The Court in *Philadelphia v. New Jersey* was reviewing a statute passed by the legislature which closed completely New Jersey's sanitary landfills to out of

state trash. In the instant case, the Court is reviewing an Order of preliminary injunction which created extra capacity at an otherwise closed landfill. Incident to that Order, out of state waste producers were prohibited from using that single site. The borders of New Jersey are still open and other private sites are still available for Philadelphia's use.

The Court itself, in *Philadelphia v. New Jersey*, specifically excluded it's opinion from applying to state-owned resources. As Justice Brennan, writing for the majority, noted in footnote number 6:

> "We express no opinion about New Jersey's power, consistent with the commerce clause, to restrict to state residents access to state-owned resources. . ." *Id at 627.*

As in *Sporhase v. Nebraska, 458 US 941 (1982)*, the ownership of the resource does not have to be absolute. Justice Stevens, writing for the majority, held that the State's claim to public ownership, although not absolute, could "support a limited preference for it's own citizens in the utilization of the resource." *Id at 956.* In the instant case, Kinsley may not be publicly owned but it is a public utility, *NJSA 48:2-13; NJSA 48:13A-1 to 1 E.* and must operate in the public interest, *NJSA 48:13A-1. Glassboro at 150.* Finally, Kinsley is not currently operating as a private landfill but on "an emergent basis pursuant to a Court Order and Department of Environmental Protection approval". *Judge DeSimone, Stenographic transcript of Decision of the Superior Court of New Jersey, Law Division, Gloucester County, dated November 19, 1984. (p.126A).* Just as the ground water at issue in *Sporhase*, the sixteen foot (16') lift created by the trial court is for the purposes of the commerce clause, a state-owned resource. The trial court's allocation of this sparse capacity is not controlled by *Philadelphia v. New Jersey, Supra,* but by *Sporhase v. Nebraska, Supra.*

The Court noted in *Philadelphia v. New Jersey*, that New Jersey could legitimately slow the flow of all waste into the states landfills, even though interstate commerce may incidentally be affected. *Id. at 626*. This was exactly what the Court sought to do by allowing only the tri-counties to use the judicially created capacity. Moreover, as the Court held in *Sporhase v. Nebraska*, 458 US 941 (1982)

> "[In] the absence of a contrary view expressed by Congress, we are reluctant to condemn as unreasonable measures taken by a State to conserve and preserve for it's own citizens this vital resource in times of severe shortage." *Id at 956*.

> "[A] State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of it's citizens — and not simply the health of it's economy — is at the core of it's police power." *Id at 956*.

In the instant case the crisis facing the three (3) counties was immediate and significant. Without the use of the sixteen foot (16') lift, the three counties, as the lower Courts have held, would have faced trash piling up in their streets. The crisis was limited geographically to only three (3) of New Jersey's twenty-one (21) counties. The Order was tailored to the specific needs of the area. No trash from outside the three (3) counties was to be allowed into the lift. The Petitioners argue that the November 29th, 1984 Order opened the lift to intrastate commerce but closed the landfill to interstate commerce. This argument lacks any merit. The Order of November 29th, 1984, only allowed for one (1) sewerage authority outside the three (3) counties to use the lift, Rockaway Valley Regional Sewerage Authority. The other four (4)

sewage treatment facilities are all located in the three (3) counties. The Petitioners completely ignore Paragraph #6 of the November 13th, 1984, Order which states:

> "6) Disposal of sewage sludge at Kinsley Landfill shall cease on March 15th, 1985." (Pa 121A)

As of March 15, 1985 no sewage sludge has been deposited in the lift. The issue of the November 13 Order opening the lift has become moot.

The Order of preliminary injunction, as embodied by the October 26th, November 13th, and November 29th, 1984 Orders, is finely tuned to meet the crisis at hand. Only upon a showing of extraordinary need has the Court allowed access to the lift. Philadelphia, has on many occasions, petitioned the trial court for access to the lift. However, it has never *proven* that access to the lift was necessary to avert a crisis of any kind.

To suggest that intrastate commerce remains unaffected by the Order is to mistake the facts. *No solid waste* which originates outside the three (3) counties may be deposited in the lift. It is irrelevant whether the trash originates in Trenton or in Philadelphia, both are excluded. Prior to Kinsley's closure, anyone was free to contract with the landfill to deposit their solid waste. Today only those communities which can prove they have no alternate sites are granted access. The situs of the community is irrelevant in this determination. The New Jersey Courts' characterization of the Order as an even-handed regulation must be upheld and the petition for certiorari denied.

**B) The trial Court's purpose in creating the Order was to avert an immediate crisis, not to discriminate against interstate commerce.**

The petitioner's argue that the Order for preliminary injunction was enacted with a desire to discriminate

against interstate commerce. The record before the Court does not support that conclusion. In the Trial Court's decision of October 26, 1984, which the petitioner omitted from their appendix, Judge DeSimone quite clearly states the criteria he used in making the decision.

> "In making this determination this court must be satisfied that several criteria are met; one, that plaintiffs have no adequate remedy at law; two, an immediate and irreparable harm will result without the restraint requested; three, that there is the reasonable probability of eventual success on the merits of plaintiffs' claim; and four, the balancing of the equities involved resulting in the determination that the harm to the plaintiffs outweighs the harm that may result to the defendants if the injunction is granted to the plaintiff or is denied as the case may be." (Ra A-2)

In applying this criteria, the trial court concluded:

> "The court is satisfied today in a temporary nature that the plaintiffs have properly invoked its equitable jurisdiction, there being no adequate remedy at law; the reasonable likelihood that the plaintiffs are entitled to relief has been met by them for the purpose of this hearing. The court recognizes that if Kinsley were permitted to close this Sunday there would be in actuality no county plan for solid waste disposal in this district. All the possible alternatives, which may be suggested or modifications of the County Solid Waste Plan and under the act would be required to undergo certain procedures before their acceptance and subsequent submission for approval by the DEP. This court is not going to wait until the 11th hour. The imminent crisis is

> upon us today and before this Court and it appears to be taking place in many districts all through this state due to the all-decreasing landfill areas and the ever- increasing public concerns of the environment." *Stenographic Transcript of Oral Decision of the Superior Court of New Jersey, Law Division, Gloucester County, Dated October 26, 1984.* (Ra A-7)

The facts are clear, the purpose of the Order was to avert a major crisis in the Delaware Valley. Unlike in *Philadelphia v. New Jersey, Supra*, the Order was designed to deal with an actual crisis in a single locale. Kinsley landfill only had a few weeks of capacity remaining. When that capacity was exhausted, the three (3) counties, Gloucester, Camden and Salem, would have *no where* to send their waste. (Pa 34A) Philadelphia, however, could easily divert it's waste to alternate sites. (Pa 45A) The borders of New Jersey were not closed by the Order, only access to a judicially ordered lift in an otherwise closed landfill facility. The trial judge was faced with the Solomonesque task of dividing the minimal space which the lift created. Philadelphia had the means to divert its waste and also singly accounted for over 50% of the waste disposed of at the site. (Pa 9A) While the communities in the three (3) counties had no way to divert its waste. Given these realities, the Court bought the three counties enough time to get alternate sites on line. Before the year is out the crisis will have passed as the new facilities come on line. The wisdom of Judge DeSimone's bold stroke is today clear to the naked eye.

But for an accident of geography, Philadelphia is not in New Jersey. That accident of geography does not imbue Philadelphia with any rights greater than those of the citizens of New Jersey. The Delaware Valley faced a

shared crisis in solid waste disposal. The Order attempted to resolve the health problems of not just New Jersey, but the region as a whole. It was not adopted with an eye to discriminate against commerce.

### C. The Order for preliminary injunction is an evenhanded balanced approach to a crisis in the disposal of solid waste.

As was noted earlier in the facts support, a conclusion that the Order for preliminary injunction was an evenhanded measure. The final hurdle that must be overcome is the balancing test articulated in *Pike v. Bruce Church, Inc., 397, U.S. 137, 142 (1970):*

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. *Accord, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981); Hughes v. Oklahoma, supra, At 336; Philadelphia v. New Jersey, Supra, at 624.*

The remaining issues are:

1. Is there a legitimate local interest involved?

2. Is there a less drastic alternative?

3. Is the impact on interstate commerce excessive in relation to the local problem?

Is there a legitimate local interest involved? Congress, when it adopted Resource Conservation and Recovery Act of 1976, as amended, 42 USC §6901, et sec., noted that the disposal of solid waste and human health were inextricably intertwined.

> ". . . disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment." 42 USC §6901 (b2)

In acknowledging the dangers to the environment concurrent with solid waste disposal, Congress expressly authorized the States to take the primary role in regulating solid waste disposal.

> ". . . [T]he collection and disposal of solid wastes should continue to be primarily the function of state, regional and local agencies . . ." 42 USC §6901 (A4).

As a finding of fact, Congress has stated that the regulation of solid waste is a legitimate local interest.

The New Jersey Courts have been unanimous in holding that the trial judge was acting to solve an actual public health emergency.

> "One would be hard pressed to discover a more legitimate state interest than that of protecting the health of the citizenry, . . . , in the preservation of diminishing sources of waste disposal." [citations omitted] *Glassboro* at 147.

> "We find the injunction to be a measured response to a genuine local health problem". *Id.* at 149.

In light of both congressional and judicial recognition of the legitimacy of the local need, the next issue is,

were there any less drastic alternatives available? In resolving this issue, the New Jersey Supreme Court stated:

> "The final inquiry in evaluating a state conservation program under *Pike* is whether the local interest can be achieved as well with a lesser impact on interstate commerce. *Pike v. Bruce Church, Inc., supra,* 397 *U.S.*, at 142, 25 *L.Ed.* 2d at 78. Put differently, the question is whether a less discriminatory injunction might adequately protect the health of the citizens of southern New Jersey. *See Hughes v. Oklahoma, supra,* 441 *U.S.* at 336, 60 *L.Ed.* 2d at 162."

In this regard, Philadelphia argues that all former users should be allowed continued access at proportionately reduced levels. At first glance, that argument appears to be fair. On closer examination, however, it becomes apparent that what is superficially fair is, in reality, a request for a preference. As stated previously, were it not for the emergent need of the three counties, Kinsley would be closed to all users. Use of Kinsley has been restricted for a limited time to avert a public health crisis in southern New Jersey. Moreover, Philadelphia has alternative sites to dispose of its garbage, albeit ones that impose increased costs on the City. In contrast, the tri-county municipalities do not have access to alternative sites, to trucks, or to what may be of greater importance, to transfer stations.

The threat to local health, which the trial court described as raising a "horrendous specter: could not be averted by a less-restrictive injunction. *See Sporhase v. Nebraska, supra, 432, U.S. at 957, 73 L.Ed. 2d at 1267; Hughes v. Oklahoma, supra, 441 U.S. at 336, 60 L.Ed. 2d*

*at 261-62; Hunt v. Washington Apple Advertising Comm'n, supra, 432 U.S. at 353, 53 L.Ed., 2d at 400.*

Based on the record before us, a plan that accorded to Philadelphia access, even if proportionately reduced, would foreshorten the life of the landfill. Such a plan would not merely be a less effective means of obtaining time for the development of alternative sites; it would be ineffective. *See Minnesota v. Clover Leaf Creamery Co., supra, 459 U.S. at 464, 473-74,* . So viewed, Philadelphia's demand that the tri-county municipalities incur substantial costs for a short-term solution is not so much a request for a less discriminatory alternative as it is an attempt to place an excessive burden on those municipalities. *Sporhase v. Nebraska, supra, 458 U.S. at 956,* . That the injunction operates evenhandedly is apparent from the burden it places on the three (3) counties to develop premanent alternatives." Id. at 152-153.

Philadelphia did suggest alternatives, but those alternatives were not feasible. The first suggestion of allowing Philadelphia, as well as New Jersey communities to utilize Kinsley Landfill at reduced levels, was completely unworkable. The problem which was being addressed by the trial court was how to buy some extra time for the tri counties to get alternate disposal sites on line. To allow Philadelphia to utilize the lift would be to leave the solution stillborn. Philadelphia accounted for over fifty per cent (50%) of the trash disposed of at the site. Even at reduced levels, the non tri county trash would quickly exhaust the remaining capacity, before the tri counties could get their alternate sites ready. This basic fact has been undisputed by the Petitioners throughout the proceedings. Without the judicially created lift, the tri-counties had no where to dispose of their trash. The

non-tri county waste producers did have alternate sites available. Given the very limited space the lift contained, non tri-county trash had to be excluded, there was no less drastic alternatives.

Petitioners quickly analyzed the above and suggested that a second lift be created. The idea that with double the capacity, there would be room for outside waste, was an unworkable alternative. The trial court held that a second lift would endanger the health and welfare of the citizens of Deptford Township. The experts from the New Jersey Department of Environmental Protection concurred that one (1) lift was all that would be safe. It was for these safety concerns that the trial court declined to approve a second lift. (Pa 194A) There were no other alternatives available to the trial court.

The Petitioners request for an across-the-board proportional allocation of the available capacity at Kinsley Landfill is just another way of phrasing the first alternative. As was stated earlier, the goal was to buy time for those entities which had no alternate disposal site to get such on line. It was not adopted as a permanent solution but an interim one.

The lower courts have been *unanimous*. There was no less drastic alternative available to the trial court to solve the crisis.

The Order clearly satisfies the first three requirements of the *Pike* test. The Order was an evenhanded approach to a legitimate local concern where there were no less drastic alternatives available. The final issue to be resolved is whether the impact on interstate commerce is outweighed by the emergent needs of the Delaware Valley.

Any interference with interstate commerce is outweighed by the emergent needs of the Delaware Valley. "New Jersey is in the throes of a solid waste crisis." *Glassboro at 141*. "As the trial court found, garbage would accumulate in the streets of Salem, Gloucester and

Camden counties if those municipalities could not use the additional sixteen foot (16') lift." *Id at 149*. The prospect of trash piling in the streets must be balanced against the minimal increase in costs to Philadelphia to dispose of its' waste. As the Petitioners have noted, a mere increase in cost is not enough of a harm to justify an infringement on another's right. However, an actual threat to the health and welfare of thousands of people in Salem, Gloucester and Camden counties is a sufficient reason to justify the limited minimal burden on interstate commerce imposed by the trial court's Order.

## III. The judicially created lift is not a private enterprise, but a state-created facility.

> ". . . I want to emphasize to all of you gentlemen, ladies and gentlemen in these proceedings, Kinsley Landfill is no longer operating as a landfill, as a private landfill; it is operating on an emergent basis pursuant to a Court Order and Department of Environmental Protection approval of the minimal of a one (1) lift expansion." *Judge DeSimone, Stenographic Transcript of Decision of the Superior Court of New Jersey, Law Division, Gloucester County, dated November 19, 1984. (p. 126A).*

The Petitioners, in arguing the instant case, relied heavily on the Court's opinion in *Philadelphia v. New Jersey, supra. Philadelphia v. New Jersey,* was never meant to apply to this situation. As Justice Brennan, writing for the majority noted in footnote number 6:

> "We express no opinion about New Jersey's power, consistent with the commerce clause, to restrict to state residents access to state-owned resources . . ." *Id at 627.*

The instant case is not the situation where, as Petitioners argue, Kinsley has continued operating pursuant

to a state license. Instead, it is operating under strict judicial scrutiny. The Court could have selected any site to place its' temporary landfill. It chose the site to be Kinsley. The fact that the site is on privately owned land, rather than public lands, is irrelevant, to Commerce Clause analysis, since without the judicial intervention there would be no useful life at the site whatsoever.

The Petitioners argue that the lift is a private enterprise. They analogize the lift to the hydroelectric plant in *New England Power Co. v. New Hampshire,* 455 US 331, (1982). As with *Philadelphia v. New Jersey, New England Power* is not applicable. *New England Power* dealt with a New Hampshire statute which provided:

> "No corporation engaged in the generation of electrical energy by water power shall engage in the business of transmitting or conveying the same beyond the confines of the State, unless it shall first file notice of its' intention so to do with the Public Utilities Commission and obtain an Order of said Commission permitting it to engage in such business". *Id at 335.*

The scope alone of the statute is far greater than the Order in the instant case. The New Hampshire statute attempts to regulate all the hydroelectric power exported from the State. The purpose of the statute was to gain an economic advantage for the citizens of New Hampshire at the expense of its' neighbors. This was clearly a case of "simple economic protectionism." *New England Power Co., Supra, Philadelphia v. New Jersey, 437 US at 624.*

In contrast, the instant case is a judicial Order creating additional limited space at an otherwise closed landfill. The purpose of that Order was to avert an undisputed crisis in the disposal of the area's solid waste. Just as the ground water in *Sporhase,* the judicially created lift was imbued with the "indicia of a good publicly produced and owned in which a state may favor it's own

citizens in times of shortage." *Id at 957*. It is not simply the fact that Kinsley Landfill is a public utility subject to state regulation, but also the fact that the trial court created the additional capacity which makes the lift a state enterprise. It was not Kinsley acting as a private enterprise which is operating today, but merely an extension of the trial court.

## CONCLUSION

The Founding Fathers provided the Commerce Clause as a safeguard of trade among the States. It was an effort to give each State equal access to all the markets within the country. However, it was not envisioned as a sword to threaten the health and safety of any States' citizenry. The health and welfare of a States' citizens were to be protected by the police power reserved to each State.

The remedies created by Judge DeSimone were not an effort to protect the economy of New Jersey. It was a rational attempt to provide for an interim solution to a pressing crisis in the Delaware Valley. Without his bold stroke, a catastrophic crisis would have been the result. The Founding Fathers believed such was at the core of a State's police power.

For the foregoing reasons, the petition for a writ of certiorari in this case should be denied.

Respectfully submitted by
Bruce C. Hasbrouck
*Counsel of Record*

Attorney for Respondent
Gloucester County Board
of Chosen Freeholders

Lewis G. Adler
of Counsel

Dated November 11, 1985

# APPENDIX

Stenographic Transcripts of Decision of the Superior Court of New Jersey, Law Division, Gloucester County Dated October 26, 1984 ... A-1

Temporary Restraining Order of the Superior Court of New Jersey, Law Division, Gloucester County Dated October 26, 1984 ..... A-12

SUPERIOR COURT OF NEW JERSEY
GLOUCESTER COUNTY — LAW DIVISION
DOCKET NO. L-070476-84 PW

| | | |
|---|---|---|
| BOROUGH OF GLASSBORO, a municipal corporation of the State of New Jersey, et al., *Plaintiffs,* | ) | |
| *vs.* | ) | STENOGRAPHIC TRANSCRIPT |
| GLOUCESTER COUNTY BOARD OF CHOSEN FREEHOLDERS, THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROBERT E. HUGHEY, Commissioner of the New Jersey Department of Environmental Protection, KINSLEY LANDFILL, INC., THE CITY OF PHILADELPHIA and THE COUNTY OF CAMDEN, *Defendants.* | ) | of Decision |

PLACE: Gloucester County Courthouse
Woodbury, New Jersey

DATE: October 26, 1984

BEFORE:

HONORABLE SAMUEL G. DeSIMONE, AJSC

DOROTHY C. BOSS, CSR
Courthouse
Woodbury, New Jersey

THE COURT: Ladies and gentlemen, this is the decision in the matter of Kinsley Landfill case, which was tried before this court by way of an Order to Show Cause brought on before the court by way of emergent relief as we call it in the law, an Action in Lieu of Prerogative Writ.

The plaintiffs seek restraints against the New Jersey Department of Environmental Protection, Gloucester County Board of Chosen Freeholders, Deptford Township as an intervening defendant and Kinsley; and in counts nine and ten, restraints against the City of Philadelphia and Camden County. The verified complaints filed by the parties are on record and, therefore, this court need not repeat the various counts alleged against the defendants in this action.

This court on an emergent basis — and we have cleared our calendar this week to cover this situation — has heard testimony and has been presented with various documents admitted in evidence in an effort to establish the basis of the allegation set forth and whether temporary or interlocutory restraints should issue pursuant to court Rule 4:52-1.

In making this determination this court must be satisfied that several criteria are met; one, that plaintiffs have no adequate remedy at law; two, an immediate and irreparable harm will result without the restraint requested; three, that there is the reasonable probability of eventual success on the merits of plaintiffs' claim; and four, the balancing of the equities involved resulting in the determination that the harm to the plaintiffs outweighs the harm that may result to the defendants if the injunction is granted to the plaintiff or is denied as the case may be.

The purpose of a preliminary restraint or injunction is to allow the court to investigate, deliberate the merits of a case while maintaining the status quo. This was succinctly stated in *Peters vs. Public Service Corporation of New Jersey,* 132 New Jersey Equity Reports, 500 at page

511, a Chancery Division opinion, 1942. This was affirmed in 133 New Jersey Equity Reports, 283 by the then Court of Errors and Appeals, 1943. As further stated in the leading case of *Suenram vs. The Society of the Valley Hospital,* 155 New Jersey Superior Court Reports, 593 at page 596, which was a Law Division case published in 1977, that injunction is a drastic remedy, which is granted sparingly and when the issues presented are grave and difficult, it is to be administered by the court with sound discretion and upon the considerations of justice, equity and morality.

In the present case, the plaintiffs have invoked the inherent equitable jurisdiction of this court due to the immediacy of the situation at hand and the inability of the parties, according to the applicable law to eradicate themselves from their unfortunate predicament. A paralysis has occurred. This court must intervene for the public good. This court does not like to be in this position of, in effect, entering the area of legislation. However, the court will be here to protect the health, morals and citizens of the State of New Jersey.

This case, ladies and gentlemen, if I might describe it, is like a ship on alien seas with no pilot. At this juncture it is up to this court today to intervene and to get the ship in a wild sea on the proper course. Once that's done and everyone does their job, then this court can step back. My purpose today, and I want the record to be clear, is solely to intervene, to get this case on its proper track and to protect the health, welfare and citizens of the State of New Jersey and specifically, Deptford Township and the County of Gloucester. That is why this court is taking jurisdiction today. Someone must do it. The buck stops here, because the issues were presented here. They shouldn't be here. They are here and I will attempt to solve them temporarily until reason prevails and the proper authorities can then take over pursuant to law.

The case at bar presents a scenario that the legislature specifically attempted to invoke by the enactment of

the Solid Waste Management Act, New Jersey Statutes Annotated 13:1E and others, hereinafter called the Act. According to the legislature, the collection, disposal and utilization of solid waste was a matter of great concern to all citizens. Thus the act attempts to create a statewide management of solid waste disposal through the solid waste districts. Each district, in this case Gloucester County, is empowered to enact a solid waste management plan subject to certification and approval by the Commissioner of the Department of Environmental Protection. Subsequent modifications are likewise within the district's power subject to certain procedures, public hearing and likewise DEP approval.

In the case at bar, the Gloucester County Plan is modified as recently as 1982 was, according to its term, to be a ten-year plan for the uninterrupted disposal of solid waste. However, in actuality, the only landfill designated for dumping waste is the Kinsley Landfill, which will reach its designed capacity in a matter of days.

The plaintiffs seek relief before this court are governed by reason of the Act by their County Solid Waste Management Plan in the collection and disposal of solid waste. The county plan as certified is to be monitored by the Department of Environmental Protection to insure a coordinated statewide system for the disposal of waste. The DEP has taken no action with regard to the imminent closing of the only landfill in this district and the county, through its Board of Freeholders, has denied an application by Kinsley to expand. Therefore, this court is requested to step into this vacuum created by the Department of Environmental Protection and the County Board of Freeholders and attempt to protect the plaintiffs and the defendants and their residence, the industries affected, personnel and, of course, an overriding concern always before this court and, that is, the environmental situation; an awesome burden that's been thrust upon this court, one court, a trial court, to solve a dilemma which is facing the citizens of the State of New Jersey.

The uncontroverted evidence ladies and gentlemen, presented to this court and I so find and it reveals to me that the Gloucester County Waste Management Plan in its present state will not provide for the uninterrupted disposal of waste until 1988. Kinsley Landfill's permitted design capacity will be reached in a matter of days and if I recall from the maze of testimony that I heard, that's October the 28th, this Sunday. Mr. Burshtin, an engineer employed by the Department of Environmental Protection testified before this very court a few days ago as to the estimated time left in the Kinsley Landfill. The court having found this witness extremely credible for the purpose of this hearing and accepts his estimation that Kinsley will reach capacity not on October 23, but November — somewhere between November 10 and November 24. I further find that Gloucester County Board of Chosen Freeholders, the political arm responsible for the formulation of the County Solid Waste Management Program, which is responsible for the plan and implementation pursuant to the Solid Waste Act, New Jersey Department of Environmental Protection represented to this court by their testimony and evidence that they will close Kinsley when it reaches its designated or designed capacity, as I heard the term in these proceedings, a permitted capacity. An affidavit was submitted by Richard Feluso, a principal in the firm of Waring Engineering, which firm prepared the design, drawings for the Kinsley Landfill. And these affidavits indicated to the court that a temporary lift to the landfill is possible. Mr. Burshtin, although not familiar with the specifics of the lift, attested and so testified that this lift is a possibility in order to temporarily extend the life of the landfill. I further find that Gloucester County Board of Freeholders denied an application for the lateral extension of the Kinsley Landfill to adjoin virgin ground that the various plaintiff municipalities are currently required to dispose of their solid waste at the Kinsley Landfill pursuant to the county plan and the DEP regulations. In addition, the

City of Philadelphia, numerous Camden County municipalities, Salem County, the Camden County Municipal Utilities Authority, are currently directed by the DEP, that is, the Department of Environmental Protection to dispose of their solid waste in Kinsley.

There is testimony before this court, and I so find, that the county is currently negotiating for an alternate site, a place called Colinville-Brookdale in Pennsylvania and I so find that it was approximately 75 miles from Gloucester County. I further find the verified allegation of the plaintiff municipalities state their existing budgets, equipment and manpower at this time are not capable of effectively disposing waste to these suggested alternate sites. I heard Mr. Perna. I was impressed with his testimony. He testified under oath on the stand that without the sludge out of Camden's MUA or Municipal Utilities Authority being dumped, it would have to be stored; that there was great danger that the Delaware River, the Delaware River that flows approximately two miles from this courthouse would be polluted. I heard testimony that trash would accumulate throughout this county. This concerns me. I heard and saw evidence in part of the record of municipalities in this county, municipalities such as Glassboro, Woodbury, National Park, Pitman, to name a few, that interjected, and even Deptford, hundreds of thousands of dollars would be effectively spent to go to alternate sites.

This has created in this court's mind, if I could simply state it and it is not simple, a doomsday of trash disposal being placed upon us today, an environmental and economical nightmare; and that's the best way to describe it. I also find that the Kinsley Landfill located in Deptford Township, its size, safety and environmental impact is of great concern to the residents of Deptford Township. I heard a housewife on the stand today testify very vividly how here eyes burn; she follows trash trucks, trash falls on the streets. I heard numbers of trucks being trucked into the Kinsley Landfill. All of this I heard —

that concerns me — of course, testimony in evidence is presented to the court concerning much more than that which I related today. But for the purpose of this hearing, the issue presented before this court today is of sufficient basis upon which I can make a determination as to the issuance of injunctive relief.

This court, although sitting in law today and hearing this matter by virtue of Prerogative Writ, there is a merger of law and equity and there is an equitable maxim that this court has employed, many, many times when I sat in the Chancery Division in this particular county and, that is, that equity never suffers a wrong without a remedy and this court today aims to mold such a remedy. I've got to. Someone has to do it today. There's a paralysis in this county that must be broken. It is beyond question that the imminent closing of the Kinsley Landfill will work an immediate and irreparable harm on the plaintiffs, trash haulers and the citizens relying on their service; budgets may be broken, necessary services will be severely impaired, utter chaos in the waste management of this county; waste may accumulate uncollected and cause a severe environmental hazard; businessmen and citizens will suffer. On the other hand Kinsley itself is of environmental concern. I can't ignore it. It's there. It won't go away. It's of concern to the citizens who live and work in Deptford Township. If it is to continue operation beyond its permitted design and capacity, the citizens of Deptford will be seriously and deleteriously affected since vertical or lateral extensions or lifts have not been approved and safety requirements have not been adequately assured by the required state agency.

The court is satisfied today in a temporary nature that the plaintiffs have properly invoked its equitable jurisdiction, there being no adequate remedy at law; the reasonable likelihood that the plaintiffs are entitled to relief has been met by them for the purpose of this hearing. The court recognizes that if Kinsley were permitted to

close this Sunday there would be in actuality no county plan for solid waste disposal in this district. All the possible alternatives, which may be suggested or modifications of the County Solid Waste Plan and under the Act would be required to undergo certain procedures before their acceptance and subsequent submission for approval by the DEP. This court is not going to wait until the 11th hour. The imminent crisis is upon us today and before this Court and it appears to be taking place in many districts all through this state due to the all-decreasing landfill areas and the ever-increasing public concerns of the environment.

This court notes that just recently in the matter of *Filcrest Realty Corporation vs. New Jersey Department of Environmental Protection vs. Industrial Land Reclaiming Company, Incorporated and County of Middlesex vs. State of New Jersey Department of Environmental Protection,* I/M/O Petition of Edgeboro Disposal, that this matter was before the Appellate Division of New Jersey, heard by the Panel of Judges McElroy, Drier and Judge Shebell. This was the Appellate Court of the Superior Court. And this particular case, although it is not published, it was brought to my attention and I did secure a copy and it does give this court guidance. In that particular case, and I want the record to be clear that I have reviewed a transcript of the trial judge's decision, the trial judge in that particular case immediately closed the landfill. Our Appellate Division stated in effect, Judge Shebell's order of October the 5th, 1984 and I read the important portions because, although this is not a published opinion, it does give me guidance, gives me guidance to know what a section of our Appellate Court does, which is a court in which appeals from this court, this court sitting in a trial court has taken. Judge Shebell stated, we grant a stay of trial judge's order of October 4 requiring immediate closing of the ILR Landfill. We deem it is within the jurisdiction of the Chancery Court

to provide for an orderly closure of the ILR Landfill giving consideration to its effect on all parties and the public. We remand to the trial judge to hold a hearing forthwith to establish a timetable under which a gradual phase-out of solid waste from ILR to the Edgeboro Landfill can be accomplished. All proceedings in regard to this appeal are stayed; and this order shall have no right or effect upon Edgeboro to pursue its right to a hearing before any State agency concerning the redirection orders.

This court is inclined to effectuate the closure of the Kinsley Landfill. But in considering the equities involved, the balancing of the hardships and most importantly considering the public interest, this court will intervene in the closure of the Kinsley Landfill, but it will intervene so that this closure is orderly.

I will grant today a preliminary restraining order barring any action by the defendants to close Kinsley Landfill. I issue this injunction within the rules as I understand them. This court has the authority to issue a temporary restraining order 20 days from the time I make my decision. I issue it for a period of 18 days. In the interim, this court orders that the Gloucester County Board of Chosen Freeholders and its Solid Waste Advisory Committee to formulate a reasonable alternative site to Kinsley and a modification of its Solid Waste Management Plan and to take all steps necessary to effectuate its formal approval by the Board and to submit the same to this court. Furthermore, I order that the Department of Environmental Protection to provide to this court a timetable for the orderly closure of the Kinsley Landfill and to take steps under their law and under their body of administrative regulations to direct the trash in an orderly fashion. Lastly, I order that Kinsley partake in this remedy, which I have molded and I want them to provide to me engineering plans for a temporary vertical expansion of the portion of the landfill not in use, not any virgin ground, no expansion. I want to know what Mr. Burshtin — and everyone was in court and heard his testimony —

is it safe to go up a little bit? Said plan is to be delivered to the DEP care of Mr. Burshtin, who tesitified right in this court that he could review the proposed temporary lift in a matter of three or four days. Upon completion of the review of Mr. Burshtin of the DEP or those qualified in that department, said proposal shall be submitted to this court.

It is further ordered that upon good cause shown, this order which is a temporary order, may be modified, enlarged or dissolved on a one-day notice. Now, I am intervening again. I am relaxing the court rules. The court rules provide for a two-day notice on a modification. Because of the urgency of this matter, because it concerns this court, I, who have the power to do it under the court rules are relaxing. I will hear this matter day or night on a one-day notice, personally, and I have so ordered. Because of my orders, certain parties have to do certain things. It is unnecessary at this particular time, because again, I rely on Mr. Burshtin's testimony who I heard under oath, to restrain the City of Philadelphia and Camden from disposing waste at the Kinsley Landfill. However, so that everyone knows where I am coming, I reserve that decision, that decision with regard to Philadelphia, Camden for another day and pending further hearing.

In order to effectuate this very emergent situation and to put this matter into effect, because doomsday is upon us, 9:00 a.m. November 13, 1984 I will clear my calendar at 9 o'clock and I will meet all the attorneys in this courtroom to hear further arguments in regard to whether my restraints should be dissolved, continued, extended or modified and that is the date which I want all people to come back, 9 o'clock in this courtroom or you can check with Mrs. Dodson, my secretary and she will tell you where I will be sitting. In addition thereto, and this is very important so that this court is not caught and so that I can be prepared and not caught at the last minute, because as you are aware I have had to study a

voluminous amount of evidence and excellent briefs in regard to this matter in a short period of time, I order that all of these reports that I am calling for, the engineering report, the DEP report, the Solid Waste Management Gloucester County Report be submitted to my chambers by 4 o'clock Friday, November 9, 1984.

Now ladies and gentlemen, this has been a most difficult case. This court now I feel has done its job today. Now I direct the county, DEP and Kinsley Landfill to do theirs. And I find and determine that all the parties before this court are reasonable people. This country was founded upon laws promulgated by the people and our people live by law and order. And if everyone does their job we are all going to solve this crisis so that we won't have to be back before a court such as myself asking to intervene.

Thank you for your courtesies. That is the order of the court today. Mr. Lisa, you will prepare the order under the five-day rule.

(Whereupon the hearing was concluded.)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
GLOUCESTER COUNTY
DOCKET NO. L-070476-84 PW

BOROUGH OF GLASSBORO, a municipal corporation of the State of New Jersey

*Plaintiff*

*v.*

GLOUCESTER COUNTY BOARD OF CHOSEN FREEHOLDERS, et al

CIVIL ACTION

TEMPORARY RESTRAINING ORDER

This matter having been opened to the Court by Joseph F. Lisa, Esq., attorney for Plaintiff Borough of Glassboro, and in the presence of counsel for the various parties to this cause as indicated on the list and annexed hereto, and this matter having been heard by the Honorable Samuel G. DeSimone on October 19, 23, 24, 25 and 26, 1984 and the Court having heard the testimony of the various witnesses, having reviewed the various exhibits, affidavits and briefs submitted by counsel and having heard the arguments of counsel, and it appearing to the Court that there is an immediate threat of irreparable injury if temporary restraints are not granted, and for the reasons set forth by the Court in its oral Opinion on October 26, 1984, and for good cause shown:

It is on this 26th day of October, 1984, ORDERED that defendants are restrained from taking any action which would prevent the continued uninterrupted use of Kinsley Landfill until and including November 13, 1984;

And it is further ORDERED that not later than November 9, 1984, the County of Gloucester shall formulate a reasonable alternate site for solid waste disposal and to modify its Solid Waste Management Plan accordingly, and take all steps necessary to effectuate same,

and shall submit a written report to the Court by 4:00 P.M. on November 9, 1984;

And it is further ORDERED that not later than November 9, 1984, the DEP shall submit a timetable for the orderly closure of the Kinsley Landfill and take steps to redirect waste flow in an orderly fashion and submit a report to the Court by 4:00 P.M. on November 9, 1984;

And it is further ORDERED that not later than November 5, 1984, Defendant Kinsley Landfill, Inc. shall submit to Walter Burshtin of the DEP and to the Court, a complete engineering design for the vertical expansion of the Kinsley Landfill for one additional lift of compacted solid waste;

And it is further ORDERED that not later than November 9, 1984, the DEP shall review the Engineering design and submit a written report to the Court by 4:00 P.M. on that date;

And it is further ORDERED that all reports and submissions required by this Order shall be made available to all counsel on November 9, 1984 by 4:00 P.M. at the Gloucester County Court House;

It is further ORDERED that the Court shall reserve decision on the application for restraints against the County of Camden and the City of Philadelphia;

And it is further ORDERED that all counsel shall appear before the Court on November 13, 1984 at 9:00 A.M. for argument regarding the continuation, dissolution or modification of this Order and the restraints contained therein;

And it is further ORDERED that any provision of this Order may be modified or dissolved by application of any party on one-day notice to all other parties.

SAMUEL G. DE SIMONE, A.J.S.C.